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PIK - CRIMINAL

PATTERN INSTRUCTIONS KANSAS 4TH CRIMINAL

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Prepared by:
KANSAS JUDICIAL COUNCIL
PIK-CRIMINAL ADVISORY COMMITTEE

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PIK - CRIMINAL

PREFACE

The Judicial Council PIK-Criminal Advisory Committee is pleased to present this 4th Edition of Pattern Instructions Kansas—Criminal. PIK 4th covers statutes enacted through the 2011 legislative session, Kansas Supreme Court decisions through Vol. 292, No. 2, and Kansas Court of Appeals decisions through Vol. 45, No. 4.

One of the most challenging tasks for a trial judge is instructing the jury about the law that applies to a case. Complex statutes and difficult legal principles must be translated into clear and understandable statements that equip a juror with the legal background necessary to render a worthy verdict. This edition of pattern criminal instructions for Kansas contains the Committee's recommended changes to our patterns engendered by the Legislature's recent recodification of the criminal code, now found at K.S.A. 21-5101 *et seq.*

This work required every instruction to be reviewed, revised, or removed. The entire book has been reorganized and renumbered to roughly correspond to the organization of the new criminal code. For example, chapter 52 corresponds to article 52 of Chapter 21 of the statutes, and so forth. A cross-reference table is included as Appendix 2 for those seeking the prior version of any pattern instruction.

In one of the changes included in the code, the Legislature introduced into Kansas criminal jurisprudence the concept of a required "culpable mental state" of the accused, which supplants the older ideas of specific and general criminal intent. The instructions dealing with this concept can be found in Chapter 52. While a few of the new statutes specifically waive proof of a culpable mental state, most do not. A careful review of each charging statute is required for any judge wishing to accurately instruct a jury about this element.

The Committee also wishes to point out that these are patterns—that is to say—suggestions on language that can tell a juror what the law is. But one size does not fit all and judges and lawyers should feel free to modify these patterns as justice and the facts of each case require.

All pattern instructions are works in process. With every appellate case, every session of the legislature, the law is either clarified or changed. We have taken great pains to keep this work error free. But we are realistic and seek your help and feedback. If an error is discovered, please advise the Council staff so corrections can be made in a future supplement.

I want to publicly express my gratitude and admiration for the members of the Committee. They are truly men and women dedicated to making the jury system a valuable institution, protector of our hard won liberties and worthy of great efforts to keep it working smoothly. None of them shirked their responsibility but, instead, rolled up their sleeves and worked hard to make these instructions as accurate as possible but understandable for those not trained in the law. The following Committee members contributed to PIK-Criminal 4th: Hon. David W. Boal, Kansas City; Hon. Thomas H. Bornholdt, Olathe; Hon. Edward E. Bouker, Hays; Prof. James Concannon, Topeka; Hon. David W.

Kennedy, Wichita; Hon. Michael J. Malone, Lawrence; Hon. Nancy E. Parrish, Topeka; Hon. Janice D. Russell, Olathe; Hon. Philip C. Vieux, Garden City; and Hon. Mike E. Ward, El Dorado.

Finally, this volume would not have been completed if it had not been for the hard work, talent and dedication of Judicial Council Executive Director Nancy J. Strouse and her team, Janelle L. Williams, Marian L. Clinkenbeard, and intern, Taryn Locke. Their meticulous efforts have produced a set of instructions that give the busy trial judge a good start in meeting the challenge of teaching the law to the jury.

Hon. Stephen D. Hill, Chair
Kansas Judicial Council
PIK-Criminal Advisory Committee

PREFACE TO 2012 SUPPLEMENT

The Judicial Council PIK-Criminal Advisory Committee is pleased to present this first supplement to the 4th Edition of Pattern Instructions Kansas – Criminal. This supplement covers statutes enacted through the 2012 legislative session, Kansas Supreme Court decisions through Vol. 294, No. 2, and Kansas Court of Appeals decisions through Vol. 47, No. 3.

As periodically occurs, the PIK committee saw changes in membership this past year. Our fearless leader, the Hon. Stephen D. Hill called it good after serving on both the PIK Criminal and Civil committees since 1995. Since the retirement of the Hon. David Knudson in 2003, Judge Hill had served as our chair, handing out assignments, prodding us along in this never ending work, and bringing leadership, clarity and occasional levity to our meetings. Judge Hill promoted the worthy concept of transforming existing jury instructions into plain English so as to make them more user friendly not only for the bench and bar, but more importantly for the jurors who must construe and apply them. We thank Judge Hill for his years of service to the PIK committees, and we wish him well in his continuing tenure on the appellate bench.

In addition, since completion of PIK Criminal 4th in 2012, several members have retired or will soon retire from the bench and from the PIK committees. We thank the Hon. Thomas Bornholdt, the Hon. Janice Russell, and the Hon. David Boal for their years of service to the PIK committees and their friendship to us all. Thankfully, with these departures have come some wonderful additions to the PIK committees, namely the Hon. Daniel Creitz, the Hon. Timothy Lahey and the Hon. David Stutzman. We look forward to their continued input and contributions to our work.

Lastly, on behalf of the entire committee, I would like to express my gratitude to Judicial Council Executive Director Nancy J. Strouse for her persistent hard work in helping us prepare for our meetings, and in the hard work of turning the product of our meetings into the black and white of approved and published jury instructions. Likewise to the members of Nancy's team, Janelle Williams and Marian Clinkenbeard.

Hon. Mike Ward, Chair
Kansas Judicial Council
PIK-Criminal Advisory Committee

PREFACE TO 2013 SUPPLEMENT TO PATTERN INSTRUCTIONS KANSAS—CRIMINAL 4TH

The 2013 supplement was prepared by the Judicial Council PIK Criminal Advisory Committee and the Judicial Council staff.

This supplement covers statutes enacted through the 2013 legislative session, Kansas Supreme Court decisions through Vol. 297, No. 1, and Kansas Court of Appeals decisions through Vol. 48, No. 7.

Members of the Committee who worked on the 2013 supplement are: Hon. Mike E. Ward, El Dorado, Chair; Hon. Ed Bouker, Hays; Prof. Jim Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. David J. King, Leavenworth; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. David Stutzman, Manhattan; Hon. Philip C. Vieux, Garden City; and Hon. Sara Welch, Olathe.

PREFACE TO 2014 SUPPLEMENT TO PATTERN INSTRUCTIONS KANSAS—CRIMINAL 4TH

The 2014 supplement was prepared by the Judicial Council PIK Criminal Advisory Committee and the Judicial Council staff.

This supplement covers statutes enacted through the 2014 legislative session, Kansas Supreme Court decisions through Vol. 299, No. 2, and Kansas Court of Appeals decisions through Vol. 50, No. 2.

Members of the Committee who worked on the 2013 supplement are: Hon. Mike E. Ward, El Dorado, Chair; Hon. Ed Bouker, Hays; Prof. Jim Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. David J. King, Leavenworth; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. David Stutzman, Manhattan; Hon. Philip C. Vieux, Garden City; and Hon. Sara Welch, Olathe.

PREFACE TO 2015 SUPPLEMENT TO PATTERN INSTRUCTIONS KANSAS—CRIMINAL 4TH

The 2015 supplement was prepared by the Judicial Council PIK Criminal Advisory Committee and the Judicial Council staff.

This supplement covers statutes enacted through the 2015 legislative session, Kansas Supreme Court decisions through Vol. 301, No. 4, and Kansas Court of Appeals decisions through Vol. 51, No. 4.

Members of the Committee who worked on the 2015 supplement are: Hon. Mike E. Ward, El Dorado, Chair; Hon. Ed Bouker, Hays; Prof. Jim Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. David J. King, Leavenworth; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. David Stutzman, Manhattan; Hon. Philip C. Vieux, Garden City; and Hon. Sara Welch, Olathe.

PREFACE TO 2016 SUPPLEMENT TO PATTERN INSTRUCTIONS KANSAS—CRIMINAL 4TH

The 2016 supplement was prepared by the Judicial Council PIK Criminal Advisory Committee and the Judicial Council staff.

This supplement covers statutes enacted through the 2016 legislative session, Kansas Supreme Court decisions through Vol. 304, No. 2, and Kansas Court of Appeals decisions through Vol. 52, No. 5.

Members of the Committee who worked on the 2016 supplement are: Hon. Mike E. Ward, El Dorado, Chair; Hon. Ed Bouker, Hays; Prof. Jim Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. David Stutzman, Manhattan; Hon. Philip C. Vieux, Garden City; and Hon. Sara Welch, Olathe.

PREFACE TO 2017 SUPPLEMENT TO PATTERN INSTRUCTIONS KANSAS—CRIMINAL 4TH

The 2017 supplement was prepared by the Judicial Council PIK Criminal Advisory Committee and the Judicial Council staff.

This supplement covers statutes enacted through the 2017 legislative session, Kansas Supreme Court decisions through Vol. 306, No. 2, and Kansas Court of Appeals decisions through Vol. 54, No. 2.

Members of the Committee who worked on the 2017 supplement are: Hon. Mike E. Ward, El Dorado, Chair; Hon. Ed Bouker, Hays; Prof. Jim Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. Philip C. Vieux, Garden City; and Hon. Robert J. Wonnell, Olathe.

PREFACE TO 2018 SUPPLEMENT TO PATTERN INSTRUCTIONS KANSAS—CRIMINAL 4TH

The 2018 supplement was prepared by the Judicial Council PIK Criminal Advisory Committee and the Judicial Council staff.

This supplement covers statutes enacted through the 2018 legislative session, Kansas Supreme Court decisions through Vol. 308, No. 1, and Kansas Court of Appeals decisions through

Members of the Committee who worked on the 2018 supplement are: Hon. Mike E. Ward, El Dorado, Chair; Hon. Ed Bouker, Hays; Prof. Jim Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. Philip C. Vieux, Garden City; and Hon. Robert J. Wonnell, Olathe.

PREFACE TO 2019 SUPPLEMENT TO PATTERN INSTRUCTIONS KANSAS—CRIMINAL 4TH

The 2019 supplement was prepared by the Judicial Council PIK Criminal Advisory Committee and the Judicial Council staff.

This supplement covers statutes enacted through the 2019 legislative session, Kansas Supreme Court decisions through Vol. 309, No. 4, and Kansas Court of Appeals decisions through Vol. 56, No. 8.

Members of the Committee who worked on the 2019 supplement are: Hon. Mike E. Ward, El Dorado, Chair; Hon. Kevin Berens, Colby; Prof. Jim Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. Amy J. Hanley, Lawrence; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; and Hon. Robert J. Wonnell, Olathe.

The PIK Advisory Committee welcomes your input. Comments and suggestions about the pattern instructions in this book may be emailed to: judicial.council@ks.gov.

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50.010

CAUTIONARY INSTRUCTION FOR IMPANELED JURORS

Now that you have been chosen as jurors for this trial, you are required to decide this case only on the evidence admitted. At the end of the case, I will instruct you on the law that you must apply to the evidence in order to reach a verdict. For your verdict to be fair, you must not be exposed to any information about the case, the law, or any of the issues involved in this trial beyond that which is admitted during the trial.

Do not seek information about the case beyond what you see and hear in this courtroom. Do not use any printed or electronic sources to get information about this case or any of the issues involved. These sources include the internet, social media, reference books, dictionaries, newspapers, magazines, television, radio, computers, smartphones, or any other electronic device. You must not do any personal investigation about the issues, including visiting any of the places involved in this case, or use Internet maps or Google Earth to examine the scene. You cannot talk to any possible witnesses, or create your own demonstrations or re-enactments of the events which are the subject of this case.

Do not communicate with anyone about this case or your jury service, and do not allow anyone to communicate with you. In particular, you may not talk about the case by using cell phones, emails, text messages, tweets, blogs, chat rooms, comments or other postings on Facebook or any other website. You may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached by anyone, in any way, about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. You should then report the contact to the bailiff of the court as soon as possible.

The court recognizes that these rules and restrictions may affect activities that you would consider to be normal and harmless. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to produce and discuss.

Any juror who violates these rules and restrictions jeopardizes the fairness of these proceedings. Violations may be punished as contempt of court. In addition, a mistrial could result, causing the entire trial process to start over. If you become aware that a juror has done something that violates these instructions, you must report that to the court.

These rules and restrictions remain in effect until you have been discharged from your jury service.

Notes on Use

The Committee recommends that this instruction be read to the jury at the start of every trial. The proliferation of electronic devices giving unlimited access to outside-the-courtroom sources of information, human and digital, creates a very real possibility of juror misconduct and resulting mistrials.

50.020

INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

The defendant is charged with _____. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

[Depending on the evidence, I may in my final instructions define one or more less serious crimes. If this becomes necessary, I will give you specific definitions at that time.]

It is your duty to presume that the defendant is not guilty of the crime(s) charged. The law requires the State to prove the defendant is guilty beyond a reasonable doubt. The burden is always on the State. The defendant is not required to prove innocence or to produce any evidence.

During the course of this trial, you may consider the testimony of witnesses, an article or document admitted as an exhibit, or any other matter admitted in evidence such as an admission or stipulation.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness testifies.

Notes on Use

If a judge wishes to give some instructions before the introduction of evidence, it is authorized by K.S.A. 22-3414(3). If there is a possibility of giving lesser included crime instructions the paragraph in brackets should be given.

Comment

The Committee recommends that the above basic instructions be given to the jury before the introduction of evidence, so that the jury will have a better understanding of its function. This instruction informs the jury about the elements of the crime, the burden of proof (PIK 4th 51.010), consideration of the evidence (PIK 4th 50.050), and weighing the credibility of witnesses (PIK 4th 51.060).

The second paragraph of the above instruction relative to the elements of the crime must be supplemented by setting forth the elements in detail for the particular crime. These elements will be found by referring to that section of this book which deals with that crime. If the defendant is charged with more than one crime, then the judge should list the elements of each offense.

Usually, lesser included offenses should not be given in introductory instructions. A judge cannot be sure if any lesser included offenses are proper for jury consideration until the judge hears the evidence. Two factors suggest, however, the desirability of alerting the jury that there is the possibility of a lesser offense for the jury to consider: (1) A judge's communication should be consistent from the start to the finish of the trial, and (2) it seems unfair for the jury to first learn at the end of the trial that there may be a number of crimes to consider in addition to the crime charged.

50.030

NOTE TAKING BY JURORS

Members of the jury, you will be permitted to take notes during the trial. Whether you do so is entirely up to you. However, do not allow the taking of notes to distract you from viewing or listening attentively to the evidence being presented.

You may use your notes to refresh your memory as you deliberate. However, your deliberations must be based upon the collective memory and recollection of the entire jury as to the evidence admitted. Notes should be used only as an aid to this function and not as a substitute.

You must not remove any of your notes from the courtroom. I will instruct you on how to secure your notes.

At the conclusion of the trial, you must give your notes to the bailiff for immediate destruction.

Notes on Use

The above instruction should be given when note taking by jurors is allowed by the trial judge. In making that decision the trial judge may wish to consider the anticipated length of the trial, the technical nature of the subjects about which the witnesses will testify, and the amount of detail which must be sifted through by the jurors in order to be competent fact finders. If the trial judge does not allow note taking by jurors, it is recommended that the trial judge advise jurors of that prohibition at the start of the trial.

Comment

Note taking by jurors is a matter of "sound judicial discretion." *State v. Jackson*, 201 Kan. 795, 799, 443 P.2d 279 (1968), *cert. denied*, 394 U.S. 908, 22 L. Ed 2d 219, 89 S. Ct. 1019 (1969), *overruled on other grounds by State v. Mims*, 220 Kan. 726, 556 P.2d 387 (1976). A more comprehensive review of the subject is contained in 14 ALR 3rd 831.

The fact that a juror takes notes during trial (when not specifically authorized by the court) does not create error per se. A defendant must show that there has been prejudice to his substantial rights. *State v. Jones*, 222 Kan. 56, Syl. ¶ 8, 563 P.2d 1021 (1977).

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50.040

**CONSIDERATION AND BINDING
APPLICATION OF INSTRUCTIONS**

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You must decide the case by applying these instructions to the facts as you find them.

Notes on Use

For authority, see K.S.A. 22-3403(3).

Comment

The implication of *State v. McClanahan*, 212 Kan. 208, 510 P.2d 153 (1973) is that this instruction complies with the statutory directive and the law of Kansas relative to the province of a jury.

See *State v. Pennington*, 254 Kan. 757, 764, 869 P.2d 624 (1994) relative to using the word "must" in this instruction. See also *State v. Whitaker*, 255 Kan. 118, 872 P.2d 278 (1994).

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50.050

CONSIDERATION OF EVIDENCE

In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

Notes on Use

The giving of PIK 2d 51.04 was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

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50.060

RULINGS OF THE COURT

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Notes on Use

The giving of PIK 2d 51.05 was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

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50.070

STATEMENTS AND ARGUMENTS OF COUNSEL

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

Notes on Use

The giving of PIK 2d 51.06 was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

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50.080

PENALTY NOT TO BE CONSIDERED BY JURY

Your only concern in this case is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is not to be considered in arriving at your verdict.

Notes on Use

Deletion of the second sentence of PIK 2d 51.10 was approved when the jury was instructed on the defense of insanity in *State v. Alexander*, 240 Kan. 273, 286, 287, 729 P.2d 1126 (1986). See also PIK 4th 52.130, Mental Disease or Defect—Commitment.

See PIK 4th 50.090 for an alternative instruction to be used in death penalty cases, durational departure cases, and all "Hard 40" and "Hard 50" cases occurring prior to July 1, 2014.

50.090

**PENALTY NOT TO BE CONSIDERED BY JURY—
CASES THAT INCLUDE A SENTENCING PROCEEDING**

Your only concern, at this time, is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is not to be considered in arriving at your verdict.

Notes on Use

This instruction should be used as an alternative to PIK 4th 50.080 in death penalty cases, durational departure cases, and all "Hard 40" and "Hard 50" cases occurring prior to July 1, 2014 since these cases may include a separate sentencing proceeding involving the jury.

50.100**MEDIA COVERAGE OF JUDICIAL PROCEEDINGS**

Under rules of the Kansas Supreme Court, the news media, with prior permission of the trial judge, may bring cameras and recording equipment into the courtroom to photograph or record and transmit proceedings of the district courts of Kansas. These rules are intended to enhance public knowledge and access to our court proceedings, while at the same time protecting the integrity of the proceedings.

Trial judges closely monitor these rules. In general, the rules permit photographs of the courtroom setting and the participants in the trial, including the attorneys, the judge, court staff, and persons who might be in the audience. The rules do not permit audio recording of conferences between attorneys and clients, conferences between attorneys, or bench conferences between attorneys and the judge. The rules prohibit photographing individual jurors. Background scenes that include jurors may be permitted only if no close-ups identify individual jurors. The trial judge also may prohibit the photographing of certain witnesses or participants in the proceeding.

Notes on Use

For authority, see Kansas Supreme Court Rule 1001, as amended effective October 18, 2012.

50.101

**NON-MEDIA USE OF ELECTRONIC DEVICES
IN JUDICIAL PROCEEDINGS**

Under rules of the Kansas Supreme Court, any electronic device, including a cell phone, smartphone, laptop computer, tablet computer, or still or video camera, must be turned off, put away, and out of sight in the courtroom, unless prior permission of the presiding judge or justice has been obtained.

Exceptions to this rule are granted only to court personnel, counsel of record, and unrepresented parties appearing before the court. They are allowed to use a cell phone, smartphone, laptop computer, or tablet computer during a court proceeding if the sound is off and no disruption in the proceeding occurs. An electronic device may not be used for oral communication during a court proceeding, except as permitted by other court rule.

Notes on Use

For authority, see Kansas Supreme Court Rule 1002, adopted and effective June 12, 2013.

50.110

DOMESTIC VIOLENCE FINDING

If you find the defendant guilty of insert domestic violence offense, you must then decide if the State has proved beyond a reasonable doubt that the defendant's crime or crimes were acts of domestic violence. You must all agree on your verdict.

The law defines "domestic violence" as an act or acts of violence or threatened act of violence directed toward:

- a person with whom the offender is involved or has been involved in a dating relationship; or
- a family or household member by a family or household member.

Domestic violence also includes any crime or municipal ordinance violation committed against a person or against property when the crime or ordinance violation is directed against:

- a person with whom the offender is involved or has been involved in a dating relationship; or
- a family or household member by a family or household member.

The law defines a "dating relationship" to be a social relationship of a romantic nature. In addition to any other factors, you may consider the following when deciding if a dating relationship exists or existed:

- nature of the relationship;
- length of time the relationship existed;
- frequency of interaction between the parties; and,
- amount of time since termination of the relationship, if applicable.

The law defines "family or household members" to be persons 18 years of age or older who are:

- spouses or former spouses;
- parents or stepparents and children or stepchildren;
- persons who are presently residing together;

- **persons who have resided together in the past;**
- **persons who have a child together regardless of whether they have been married or have lived together at any time; or**
- **a man and a woman, if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time.**

Notes on Use

For authority, see K.S.A. 22-4616. The definitions are found in K.S.A. 21-5111. In all criminal cases after July 1, 2011, if there is evidence that the defendant committed a domestic violence offense, the trier of fact shall determine whether the defendant committed a domestic violence offense.

A domestic violence offense finding is not a criminal offense but merely identifies the conviction as a type of crime. If the jury, as trier of the facts, finds the crime is a domestic violence offense, the court must place a domestic violence (DV) designation on the case. The court may refrain from placing a designation **only** in the event the court finds *on the record* that (1) the offender has not committed a previous domestic violence offense or completed a diversion upon a complaint alleging a domestic violence offense; **and**, (2) the domestic violence offense was not used to coerce, control, punish, intimidate or take revenge against a person with whom the offender was involved or has been involved in a dating relationship or against a family or household member.

If a domestic violence designation is placed on the case, the offender must complete a domestic violence assessment and follow all recommendations unless otherwise ordered by the court.

Verdict

1. We, the jury, find Count (#) (insert offense) was an act of domestic violence.

Presiding Juror

2. We, the jury, find Count (#) (insert offense) was not an act of domestic violence.

Presiding Juror

51.010**BURDEN OF PROOF, PRESUMPTION OF INNOCENCE,
REASONABLE DOUBT**

The State has the burden to prove the defendant is guilty. The defendant is not required to prove (he) (she) is not guilty. You must presume that (he) (she) is not guilty unless you are convinced from the evidence that (he) (she) is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty.

Notes on Use

This instruction must be given in each criminal case and should follow the element instructions for the crime charged. See K.S.A. 21-5108 on presumption of innocence and reasonable doubt, and K.S.A. 60-401(d) on burden of proof.

This instruction does not need to be repeated for separate offenses. *State v. Peoples*, 227 Kan. 127, 135, 605 P.2d 135 (1980). The State's burden, however, should be mentioned when a rebuttable presumption is utilized. See *State v. Johnson*, 233 Kan. 981, 986, 666 P.2d 706 (1983); *State v. Marsh*, 9 Kan. App. 2d 608, 612, 684 P.2d 459 (1984).

No separate instruction should be given relating to presumption of innocence and reasonable doubt. (See Committee's recommendations under PIK 4th 51.130 and 51.140.)

Comment

Because the word "should" in this instruction is advisory, not mandatory, this instruction does not usurp the jury's inherent power of nullification. It does not upset the balance between encouraging jury nullification and forbidding it. *State v. Allen*, 52 Kan. App. 2d 729, 372 P.3d 432 (2016) *rev. denied* 306 Kan. 1320 (2017) (applying "clearly erroneous" standard of review); *State v. White*, 53 Kan. App. 2d 44, 384 P.3d 14 (2016) (same) *rev. denied* 306 Kan. 1331 (2017).

Before July 1, 2011 Revisions to Criminal Code

This version of the instruction complies with the recommendation of the Supreme Court in *State v. Wilkerson*, 278 Kan. 147, 91 P.3d 1181 (2004). Prior versions of this instruction should not be used. See *State v. Gallegos*, 286 Kan. 869, 877, 190 P.3d 232 (2008).

This instruction accurately reflects the law of this State and properly advises the jury of the burden of proof, the presumption of innocence and reasonable doubt. *State v. Beck*, 32 Kan. App. 2d 784, 88 P.3d 1233 (2004).

PIK 3d 52.02 was approved in *State v. Gallegos*, 286 Kan. 869, 877, 190 P.3d 226 (2008).

In *State v. Walker*, 276 Kan. 939, 955-956, 80 P.3d 1132 (2003), the trial court, in response to a jury question, instructed the jury that reasonable doubt is "such a doubt as a juror is able to give a reason for." The Supreme Court found this definition to be improper. The court reiterated the language in *State v. Acree*, 22 Kan. App. 2d 350, 356, 916 P.2d 61 (1996): "Efforts to define reasonable doubt, other than as provided in PIK Crim. 3d 52.02, usually leads to a hopeless thicket of redundant phrases and legalese, which tends to obfuscate rather than assist the jury in the discharge of its duty."

State v. Cox, 297 Kan. 648, 304 P.3d 327 (2013), held the trial court did not commit error when it refused to instruct the jury that, "Evidence of good character alone may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of good character would commit such a crime." The legally appropriate substance of the requested instruction "was covered by other PIK instructions, including the general witness credibility instruction" in PIK Crim. 3d 52.09 (now PIK Crim. 4th 51.060).

51.020**STIPULATIONS AND ADMISSIONS**

The following facts have been agreed to by the parties and are to be considered by you as true:

- (1) _____.
- (2) _____.
- (3) _____.

Notes on Use

This instruction is usually unnecessary, although it may be given if the trial court finds it helpful to the jury.

Comment

K.S.A. 22-3217 provides for pretrial conferences in criminal matters. The statutory tools for disclosures and admissions in the criminal procedural code are as follows:

K.S.A. 22-3211, Depositions.

K.S.A. 22-3212, Discovery and inspection.

K.S.A. 22-3213, Production of statements and reports.

State v. Trotter, 245 Kan. 657, 667, 783 P.2d 1271 (1989), held it was not prejudicial error to fail to give this instruction after introduction of a stipulation since the stipulation was made during jury trial rather than at a pretrial.

51.030

**PROOF OF OTHER CRIME—LIMITED
ADMISSIBILITY OF EVIDENCE**

Evidence has been admitted (tending to prove) (alleging) that the defendant committed (crimes) (a crime) other than the present crime charged. It may be considered solely as evidence of the defendant's (motive) (opportunity) (intent) (preparation) (plan) (knowledge) (identity) (absence of mistake or accident) (insert other relevant non-propensity purpose).

Notes on Use

For authority, see K.S.A. 60-455.

According to *State v. Willis*, 51 Kan. App. 2d 971, 358 P.3d 107 (2015) *rev. denied* 304 Kan. 1022 (2016), use of the phrase "tending to prove" is appropriate when K.S.A. 60-455 evidence consists of a prior conviction. When there is no prior conviction and defendant disputes that the uncharged conduct ever occurred, the better practice is to use the term "alleging" rather than "tending to prove."

When evidence of a crime committed on another occasion is admitted either for a purpose listed in K.S.A. 60-455(b) or for some other relevant purpose not relying on an inference from propensity, the trial court must give an instruction (PIK 4th 51.030) limiting the purpose for which the evidence is to be considered by the jury. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006). *State v. Molina*, 299 Kan. 651, 325 P.3d 1142 (2014), holds this requirement applies even when defendant offers the evidence for a relevant purpose.

In contrast, when evidence of sexual misconduct is admitted under K.S.A. 60-455(d) in a prosecution for a covered sex offense, it no longer is necessary to give an instruction limiting the jury's use of the evidence to non-propensity purposes. *State v. Prine*, 297 Kan. 460, 303 P.3d 662 (2013). Jurors no longer are required to ignore the bearing defendant's other sexual misconduct may have on defendant's propensity to commit the sex crime charged. The matter will be more complicated when defendant is charged with both a covered sex offense and a nonsexual crime under a different article of the criminal code. Although evidence of other sexual misconduct may be admissible for the propensity inference on the sex offense, it remains inadmissible under K.S.A. 60-455(a) for the propensity inference on the nonsexual crime. In that case, a hybrid limiting instruction still may be necessary. See *State v. Perez*, 306 Kan. 655, 396 P.3d 78 (2017) (in case charging sex offenses plus other crimes, clarity of instruction that prior sex crimes could be considered for "propensity" could have been improved by referring explicitly to "propensity to commit other sex crimes"; omission of the additional language was not clearly erroneous in light of other instructions on permissible uses of other prior crimes that were not sex offenses).

The instruction need not be given contemporaneously with the evidence; timing of the instruction is left to the court's discretion. *State v. Hall*, 246 Kan. 728, 740-41, 793 P.2d 737 (1990). The limiting instruction must not be in the form of a "shotgun" instruction that broadly

covers all of the eight factors set forth in K.S.A. 60-455. *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976). An instruction concerning the purpose of evidence of other offenses should include only those factors that appear to be applicable under the facts and circumstances. Those factors that are inapplicable should not be instructed upon. *State v. Bly*, 215 Kan. 168, 176, 523 P.2d 397 (1974).

Erroneous admission of evidence under one exception is not considered harmless merely because it *would* have been admissible under another exception not instructed upon. *State v. McCorgary*, 224 Kan. 677, 686, 585 P.2d 1024 (1978); *State v. Marquez*, 222 Kan. 441, 447-448, 565 P.2d 245 (1977).

When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984). When defendant neither requests a limiting instruction nor objects to its omission, the failure to give the instruction is reversible only if it is clearly erroneous. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006). If defendant's request for a limiting instruction is refused in error, the conviction will be reversed unless failure to give the instruction is harmless error. *Id.* See also *State v. Denney*, 258 Kan. 437, 446, 905 P.2d 657 (1995) ("we caution trial judges that a limiting instruction should be given when requested by the defendant in every case where prior crimes evidence is admissible for one purpose but not for another, as is mandated by K.S.A. 60-406.").

K.S.A. 60-455 governs only evidence of a crime or wrong committed on another occasion. A limiting instruction is not required regarding a crime or wrong that is relevant because it was committed as part of the events constituting the crime with which defendant is charged. *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018) (limiting instruction not required regarding evidence of defendant's requests that others assist him in committing robbery or threats made afterwards to individuals present at scene; preparation immediately before crime and efforts immediately after to avoid detection were "so intertwined with the botched robbery that they are part of the robbery itself"). However, the court has assumed, without deciding, that a limiting instruction still is required when proof of a prior conviction or crime committed on another occasion is an element of the crime charged. *State v. Chavez*, 310 Kan. 421, 447 P.3d 364 (2019) (existence of valid PFA order as element of charged crime of stalking; failure to give instruction in absence of request not clearly erroneous). *State v. Sims*, 308 Kan. 1488, 1505, 431 P.3d 288 (2018) (stipulation to prior conviction as element of charge of unlawful possession of firearm).

When evidence is admitted under what is now K.S.A. 60-455(b) for a non-propensity purpose, the required limiting instruction is not clearly erroneous when it omits a definition of the non-propensity factor, such as motive or plan, for which the jury may consider the evidence. *State v. Hart*, 297 Kan. 494, 301 P.3d 1279 (2013) ("[W]e have not previously required definitions.... We do not intend to start now.").

In *State v. Ashley*, 306 Kan. 642, 396 P.3d 92 (2017), the trial court instructed the jury that evidence that defendant committed "crimes other than the present crimes charged" could be considered only for nonpropensity purposes. The Supreme Court rejected defendant's argument that the instruction was defective because it did not specify which evidence was subject to the limitation, thus permitting the jury to infer that certain noncriminal actions by defendant were criminal. In the absence of a request by defendant for an alternative instruction limiting or more narrowly defining "which crimes were contemplated by the K.S.A. 60-455 evidence," the trial court was required to give a limiting instruction despite defendant's objection to it and the instruction given was legally correct and was supported by the evidence.

Comment

The question of the admissibility of evidence of other crimes is one that has caused some confusion in the trial courts as well as differing interpretations by the appellate courts. For this reason, the Committee believes that a full examination of the issue is justified.

I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly when admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. Bly*, 215 Kan. 168, 173, 523 P.2d 397 (1974). The same evidentiary question exists in civil actions. Since the principal focus of most civil actions is not the plaintiff's or defendant's commission of, or propensity to commit, criminal acts, the inherently prejudicial impact of the admission of the party's criminal acts is arguably lessened. For that reason, the discussion focuses upon admission of evidence in a criminal action.

The reluctance of the judiciary to allow the wholesale admission of other-crimes evidence is based upon a recognition that when evidence is introduced to show that a defendant committed a crime on a previous occasion, an inference arises that the defendant has a disposition to commit crime and, therefore, committed the crime with which the defendant has been charged. Advisory Committee [on the Revised Code of Civil Procedure], *Kansas Judicial Council Bulletin*, Special Report, November 1961, pp.129-130. While the evidence of other crimes may have some probative value, the courts are properly reluctant to admit evidence that may incite undue prejudice and permit the introduction of pointless collateral issues. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan. L. Rev. 411, 416 (1972). The commentary in Vernon's Kansas Code of Civil Procedure § 60-455 (1965), which was noted in *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397 (1974), suggests that there are at least three types of prejudice that might result from the use of other crimes as evidence:

"First, a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed. Thus, in several ways the defendant is prejudiced by such evidence."

In recognition of the probable prejudice resulting from the admission of independent offenses, the Kansas Supreme Court has taken a very restrictive stance and has announced that the rule is to be strictly enforced and that evidence of other offenses is not to be admitted without a good and sound reason. *State v. Wasinger*, 220 Kan. 599, 602, 556 P.2d 189 (1976). Such evidence may *not* be admitted for the purpose of proving the defendant's inclination, tendency, attitude, propensity, or disposition to commit crime. *State v. Bly*, 215 Kan. at 175, except to the extent new subsection (d) modifies this rule of exclusion.

II. ADMISSION FOR NON-PROPENSITY INFERENCES

The starting point in any examination of the admissibility of other crimes or civil wrongs should be K.S.A. 60-455. Subsections (a) and (b), which provide for the exclusion of any evidence tending to show the defendant's general disposition to commit crimes, read as follows:

(a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.

(b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Under these subsections, evidence of other crimes may be admitted following a separate hearing if relevant for a purpose that does not rely upon an inference from defendant's general propensity, *e.g.*, for violence, and if the evidence meets the other criteria of admissibility set out below.

K.S.A. 60-455 only applies to evidence of the actual commission of a crime or civil wrong on a specified occasion. *State v. Robinson*, 303 Kan. 11, 363 P.3d 875 (2015) (testimony that defendant asked witness "to find a good looking woman from Mexico" and said he would lease apartment for her if they were sexually compatible was not crime or civil wrong; admissibility determined by relevance).

A. *Separate Hearing Required.* Admissibility of evidence of other crimes under K.S.A. 60-455 should be determined in advance of trial or, if during trial, in the absence of the jury. See *State v. Damewood*, 245 Kan. 676, 681, 783 P.2d 1249 (1989). The issue might well be determined at a pretrial hearing or an informal conference. As noted by a distinguished commentator, the task of determining admissibility can best be performed in an organized and unhurried atmosphere in which the parties can fully explore the evidentiary pattern. Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 166 (1978). The hearing should be held prior to trial to avoid delaying the progression of the trial. The purpose of the hearing is to apply the three-part test set forth below.

B. *Test of Admissibility.* In accordance with the restrictive stance of the Court regarding admission of other crimes or civil wrongs, the trial court must employ a three-part test to determine whether such evidence may be admitted. Before admitting the evidence, the trial court must find that the other crime is: (1) *relevant* to prove; (2) a *material fact that is substantially in issue*; and (3) then *balance the probative value* of the evidence against its *prejudicial effect*.

(1) *Relevancy.* Initially, the trial court must determine whether the prior conviction is relevant for a purpose that does not rely upon inferences from defendant's general propensity. The determination of relevancy must be based upon some knowledge of the facts, circumstances or nature of the prior offense. *State v. Cross*, 216 Kan. 511, 520, 532 P.2d 1357 (1975). Relevancy is more a matter of logic and experience than of law. Evidence is relevant if it has any tendency to prove or disprove a material fact, or if it renders the desired inference more probable than it would be without the evidence. *State v. Carr*, 265 Kan. at 624. If a particular factor, enumerated in the statute, is not an issue in the case, evidence of other crimes to prove that particular factor is irrelevant. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977).

(2) *Substantial Issue*. Once the trial court has found evidence of the other crime relevant to prove one of the eight statutory factors, it must then consider whether the factor to be proven is a substantial issue in the case. To be *substantial*, it must have *materiality* and *probative value*.

(a) *Materiality*. Materiality requires that the fact to be proved is significant under the substantive law of the case and properly at issue. *State v. Faulkner*, 220 Kan. 153, 156, 551 P.2d 1247 (1976). To be material for purposes of K.S.A. 60-455, the fact must have a legitimate and effective bearing on the decision of the case and be in dispute. *State v. Faulkner*, 220 Kan. at 156.

(b) *Probative Value*. Probative value consists of more than logical relevancy. Evidence of other crimes has no real probative value if the fact it is supposed to prove is not substantially at issue. In other words, the factor or factors being considered (e.g., intent, motive, knowledge, identity, etc.) must be substantially at issue before a trial court should admit evidence of other crimes to prove such factors. *State v. Bly*, 215 Kan. at 176.

For example, where criminal intent is obviously proved by the mere doing of an act, the introduction of other-crimes evidence has no probative value to prove intent (i.e., where an armed robber extracts money from a store owner at gunpoint, his or her intent is not genuinely in dispute). Likewise, where a defendant admits committing the act and the defendant's presence at the scene of the crime is not disputed, a trial court should not admit other-crimes evidence for the purpose of proving identity. The obvious reason is that such evidence has no probative value if the fact it is supposed to prove is not substantially in issue. Such evidence serves no purpose to justify whatever prejudice it creates and must be excluded for that reason. *State v. Bly*, 215 Kan. at 176. See also *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

(3) *Balancing*. As the third step of the test, the trial court must weigh the probative value of the evidence for the limited purpose for which it is offered against the risk of undue prejudice. *State v. Marquez*, 222 Kan. at 445. If the potential for natural bias and prejudice overbalances the contribution to the rational development of the case, the evidence must be barred. *State v. Bly*, 215 Kan. at 175. The balancing process is discussed extensively in *State v. Davis*, 213 Kan. 54, 57-59, 515 P.2d 802 (1973).

In *State v. Claerhout*, 310 Kan. 924, 453 P.3d 855 (2019), the court concluded it need not decide how much analysis a district court must place in the record of its balancing of probative value against the risk of unfair prejudice, or how little analysis on the record will suffice. "Reversible error does not necessarily result from failing to weigh various factors on the record." The court held any deficiency in the findings was harmless error, but the court continued to "encourage district courts to state on the record the factors considered in weighing the admissibility of K.S.A. 60-455 evidence."

The court in *Claerhout* cited, as applying generally under K.S.A. 60-455 to the balancing of probative value against the risk of unfair prejudice, the nonexclusive list of factors identified in *State v. Boysaw*, 309 Kan. 526, 439 P.3d 909 (2019), as applicable to balancing in the special case of evidence of other sex offenses offered under K.S.A. 60-455(d). See the discussion of *Boysaw* in Section C(9) below.

C. *Eight Listed Factors*. K.S.A. 60-455(b) lists eight examples of uses of evidence of other crimes and civil wrongs that do not rely upon the prohibited propensity inference. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), overrules prior case law and holds that the statutory list of examples is not exclusive and that K.S.A. 60-455 applies whenever evidence is relevant

for a purpose not relying upon the propensity inference. However, it remains important to understand what evidence is material to prove each of the specified factors. As noted above, prior to admitting evidence to prove one of these factors, it is important to establish the nature, facts, and circumstances of the other crimes.

(1) *Motive*. Motive may be defined as the cause or reason which induces action. While evidence of other crimes or civil wrongs may occasionally prove to be relevant to the issue of motive (*State v. Craig*, 215 Kan. 381, 382-383, 524 P.2d 679 [1974]), it is more often the case that the prior crime has no relevance to the issue. See *State v. Carty*, 231 Kan. 282, 288, 644 P.2d 407 (1982); *State v. McCorgary*, 224 Kan. 677, 684-685, 585 P.2d 1024 (1978). A prior crime would be relevant to the issue of motive where the defendant committed a subsequent crime to conceal a prior crime or to conceal or destroy evidence of a prior crime. It is not proper to introduce evidence of other crimes on the issue of motive merely to show similar yet unconnected crimes.

In *State v. Jordan*, 250 Kan. 180, 825 P.2d 157 (1992), "motive" is defined as the moving power that impels one to action for a definite result. Motive is that which incites or stimulates a person to do an action.

State v. Carapezza, 286 Kan. 992, Syl. ¶ 6, 191 P.3d 256 (2008), held that, depending on the facts of the case, evidence of drug usage and addiction may be admitted under K.S.A. 60-455 to prove a motive to commit robbery or burglary. The court rejected defendant's argument that because the inherent and obvious primary motive to commit these crimes is financial gain, evidence showing a secondary motive to use the stolen money to purchase drugs was irrelevant. Evidence explaining why defendant may have committed the crime charged is admissible even when motive is not an element of the offense.

(2) *Opportunity*. Opportunity simply means that the defendant was at a certain place at a certain time and consequently had the opportunity to commit the offense charged. Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. 98, 112 (1977); *State v. Russell*, 117 Kan. 228, 230 Pac. 1053 (1924). Opportunity also includes the defendant's physical ability to commit the offense. Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 164 (1978). In order to introduce evidence of another crime to prove opportunity, the two crimes must be closely connected in time and place. *Example*: If a defendant is charged with burglary during which a larceny was committed, evidence showing that the defendant committed the larceny is admissible as tending to show that he or she also committed the burglary.

Where evidence of a separate crime that is not an element of the present crime is relevant to show opportunity, in order to avoid probable prejudice, it may be preferable to have the witness to the separate crime testify regarding his or her observations of the defendant, without testifying concerning the details of the other criminal activity.

(3) *Intent*. For crimes requiring only a general criminal intent, such as battery, larceny, or rape, the element of intent is proved by the mere doing of the act and evidence of other crimes on the issue of intent ordinarily has no probative value and should not be admitted. For crimes requiring a specific criminal intent, such as premeditated murder or possession with intent to sell, prior convictions evidencing the requisite intent may be very probative. *State v. Faulkner*, 220 Kan. 153, 158, 551 P.2d 1247 (1976). However, the crucial distinction in admitting other crimes evidence on the issue of intent is not whether the crime is a specific or general intent crime, but whether the defendant has claimed his acts were innocent. *State v. Graham*, 244 Kan. 194, 198, 768 P.2d 259 (1989). Intent becomes a matter substantially in issue when the commission of an act is admitted by the

defendant and the act may be susceptible of two interpretations, one innocent and the other criminal. In that instance, the intent with which the act is done is the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.

Where criminal intent is obviously proved by the mere commission of an act, the introduction of other-crimes evidence has no real probative value to prove intent and it is error to admit it. *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

State v. Davidson, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003), acknowledged that Kansas case law has not always been consistent on the question whether other crimes evidence is admissible to show intent when defendant simply denies that the acts charged ever occurred. The court concluded that the most recent cases require defendant to have asserted an innocent explanation for an acknowledged act before intent will be considered a disputed material issue. *Davidson* is cited with approval in *State v. Boggs*, 287 Kan. 298, 315, 197 P.3d 441 (2008) (defendant's use of controlled substance on other occasions may be relevant in non-exclusive possession case on issues of intent, knowledge, or absence of mistake; however, when defendant does not assert that his actions were innocent but rather presents defense that he did not know substance was present in pickup, evidence of other crimes is inadmissible to prove intent or knowledge).

Examples: Where a stabbing was susceptible of two interpretations, that defendant acted in self-defense or with the intent to kill, evidence of a prior conviction for aggravated battery was properly admitted to prove intent. *State v. Synoracki*, 253 Kan. 59, 74, 853 P.2d 24 (1993). Where the defendant had broken a jewelry store window, had taken the items on display, and had fled, it was clear that the crime was intentional and evidence of a prior crime should not have been admitted. *State v. Marquez*, 222 Kan. 441, 446, 565 P.2d 245 (1977). Intent is not at issue where there is clear evidence of malice and willfulness. *State v. Hensen*, 221 Kan. 635, 645, 562 P.2d 51 (1977). Intent was properly in issue where the charge of attempted burglary was supported by circumstantial evidence and the defense alleged that the defendant was on his way to see his girlfriend. *State v. Wasinger*, 220 Kan. at 602-603.

(4) *Preparation.* Preparation for an offense consists of devising or arranging means or measures necessary for its commission. *State v. Marquez*, 222 Kan. at 446 (citing Black's Law Dictionary). A series of acts may have strong probative value in showing preparation if such acts convince a reasonable person that the actor intended that prior activities culminate in the commission of the crime at issue. *State v. Grissom*, 251 Kan. 851, 925, 840 P.2d 1142 (1992); *Slough, Other Vices, Other Crimes*, 20 Kan. L. Rev. at 422.

(5) *Plan.* Plan refers to the antecedent mental condition that points to the commission of the offense or offenses planned. The purpose in showing a common scheme or plan is to establish, circumstantially, the commission of the act charged and the intent with which it was committed. Admission of evidence under K.S.A. 60-455 to show plan has been upheld under at least two theories. "In one the evidence, though unrelated to the crime charged, is admitted to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes. . . . The rationale for admitting evidence of prior unrelated acts to show plan under K.S.A. 60-455 is that the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts. In such cases the evidence is admissible to show the plan or method of operation and the conduct utilized by the defendant to accomplish the crimes or acts. (citations omitted). . . . Another line of cases has held evidence of prior

crimes or acts is admissible to show plan where there is some direct or causal connection between the prior conduct and the crimes charged (citations omitted)." *State v. Damewood*, 245 Kan. 676, 681-83, 783 P.2d 1249 (1989). See also *State v. Tiffany*, 267 Kan. 495, 500-02, 986 P.2d 1064 (1999); *State v. Grissom*, 251 Kan. at 922-25.

The line between using evidence of other incidents for the propensity inference and using it for another purpose has been difficult for courts to draw, particularly when it is offered to prove common plan and defendant denies that the act charged occurred. *State v. Prine*, 287 Kan. 713, 200 P.3d 1 (2009) [*Prine I*], concluded that the standard used in older cases, requiring that the method used to commit the other crime be "similar enough" to establish common modus operandi, made "the line between mere propensity evidence and plan evidence . . . simply too thin for this court—or any court—to traverse predictably or reliably." To admit evidence of prior bad acts to prove plan, *Prine I* held "the evidence must be so strikingly similar in pattern or so distinct in method of operation to the current allegations as to be a signature." (Syl. ¶ 6). *Prine I* was a prosecution for sexual abuse of a child. The court held that evidence of defendant's conduct with two other young girls was inadmissible because the similarities did not constitute a "signature." The court was disturbed that "the modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child" but concluded that modification of the propensity rule to take account of these psychological insights was for the legislature, not the courts.

The 2009 legislature responded to *Prine I* by adding subsections (d)-(h), altering the rules governing admission of evidence of other offenses in prosecutions for sexual offenses generally. These subsections are discussed in section (9), *infra*. It also added subsection (c), providing that in prosecutions for offenses other than sexual offenses, evidence of other crimes "is admissible to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts." The *Prine I* standard of proof for evidence offered to show plan may still apply in prosecutions other than for sexual offenses. Subsection (c) does not mandate a return to the "similar enough" standard used in older cases to determine when common modus operandi was provable. Rather, subsection (c) requires that the method of committing the other offense be "so similar" to the method in the current case "that it is reasonable to conclude the same individual committed both acts." So phrased, the subsection merely states the rationale for admitting evidence to show plan, not a test for similarity. It uses language identical to that in *State v. Damewood*, 245 Kan. 676, 682, 783 P.2d 1249 (1989) ("The rationale for admitting evidence of prior unrelated acts to show plan under K.S.A. 60-455 is that the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts."). Subsection (c) thus poses the question of how much similarity is required to draw that conclusion but does not answer the question. *Prine I* posed the same question and its answer was that it is reasonable to conclude that the same person committed both offenses only when there are striking similarities between the methods of committing the offenses, amounting to a signature. Continued application of that standard would not be inconsistent with subsection (c). Subsection (c) expressly applies only in a criminal action "other than" an action in which defendant is accused of a sex offense under Article 54, 55, or 56 or other specified statute. Thus, because *State v. Prine*, 297 Kan. 460, 303 P.3d 662 (2013) [*Prine II*], was a prosecution only for sex offenses, the court declined to determine for cases to which subsection (c) applies "the meaning and efficacy of the legislature's apparent effort to modify the 'strikingly similar' or 'signature' standard enunciated in *Prine I*."

Subsection (c) has one oddity. "Signature" crimes committed after the crime charged have always been admissible when relevant to show modus operandi or common plan, but new subsection (c) refers only to "the method of committing the prior acts."

(6) *Knowledge*. Knowledge signifies an awareness of wrongdoing. Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 419; *State v. Faulkner*, 220 Kan. at 156. Knowledge is important as an element in crimes that require specific intent, such as receiving stolen property, committing forgery (*State v. Wright*, 194 Kan. 271, 275-276, 398 P.2d 339 [1965]), uttering forged instruments, making fraudulent entries, and possessing illegal drugs (*State v. Graham*, 244 Kan. at 196-98; *State v. Faulkner*, 220 Kan. at 156.) See Slough, 20 Kan. L. Rev. at 419.

(7) *Identity*. Where a similar offense is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both of the offenses. *State v. Bly*, 215 Kan. at 177. Similarity must be shown in order to establish relevancy. *State v. Henson*, 221 Kan. 635, 644, 562 P.2d 51 (1977). The quality of sameness is important when pondering the admission of other crimes to prove identity. *State v. Johnson*, 210 Kan. 288, 294, 502 P.2d 802 (1972) (citing Slough, 20 Kan. L. Rev. at 420). In general, see Note, *Evidence: Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial*, 14 Washburn L. J. 367 (1975). See also *State v. Smith*, 245 Kan. 381, 389, 781 P.2d 666 (1989); *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990); *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1989).

For examples, see *State v. Higgenbotham*, 271 Kan. 582, 23 P.3d 874 (2001) (where prior murder was committed in similar manner); *State v. Lane*, 262 Kan. 373, 940 P.2d 422 (1997) (murders of abducted children held sufficiently similar); *State v. Richmond*, 258 Kan. 449, 904 P.2d 974 (where prior rape and robbery were committed in similar manner).

(8) *Absence of Mistake or Accident*. Absence of mistake simply denotes an absence of honest error; evidence of prior acts illustrates that the doing of the criminal act in question was intentional. *State v. Faulkner*, 220 Kan. at 156-157; Slough, 20 Kan. L. Rev. at 422.

(9) *Sexual Offenses*. Subsections (d)-(g) were added to K.S.A. 60-455 in 2009 in response to the opinion in *State v. Prine*, 287 Kan. 713, 200 P.3d 1 (2009) [*Prine I*], that restricted the admission of evidence of other instances of child sexual abuse to prove plan. Subsection (d) provides:

Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under...articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated [or other listed statutes], evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative.

State v. Prine, 297 Kan. 460, 303 P.3d 662 (2013) [*Prine II*], held that when defendant is "accused" of a covered sex offense, subsection (d) permits evidence of another act or offense of sexual misconduct, as defined in K.S.A. 60-455(g), to be admitted for the propensity inference or any other matter for which the evidence is "relevant and probative." The court cited in support of this interpretation federal decisions from five circuits, including the Tenth Circuit, interpreting Federal Rules of Evidence 413 and 414, after which the 2009 amendment was patterned.

When evidence is offered under K.S.A. 60-455(d), the trial judge still must perform a gatekeeping function to determine that the evidence is "relevant and probative." The "and probative" language does not appear in the corresponding Federal Rules and was added late in the enactment process on the assumption it would restrict application of the subsection in some cases. However, without discussing the enactment process, the court in *Prine II* concluded that the "and probative" language was redundant because the requirement of relevance includes both materiality and probative value.

In *State v. Boysaw*, 309 Kan. 526, 439 P.3d 909 (2019), the court rejected defendant's claim that admission of evidence under K.S.A. 60-455(d) for the propensity inference violated his federal constitutional right to due process and to a fair trial. The trial court informed the jury of defendant's prior conviction for sexual assault of a nine-year old child, including details of the assault which closely matched defendant's alleged conduct with a six-year old child in the current case. Kansas statutes do not expressly require the trial court to balance probative value against prejudice when admitting evidence for the propensity inference under K.S.A. 60-455(d). However, the court cited federal decisions under Federal Rules 413 and 414 holding that the assurance the balancing test provides that potentially devastating evidence of little probative value will not reach the jury is an integral part of safeguarding the right to a fair trial.

Factors identified in *Boysaw* which should be considered in evaluating probative value include how clearly the prior act was proved, how probative the evidence is of the material fact sought to be proved, how seriously disputed the material fact is, and whether the government can obtain any less prejudicial evidence. Considerations in assessing prejudice include the likelihood the evidence will contribute to an improperly based jury verdict, the extent to which the evidence may distract the jury from the central issues, and how time consuming it will be to prove the prior conduct.

The court in *Prine II* noted the observation in *United States v. Enjady*, 134 P.3d 1427 (10th Cir. 1998), that exclusion of relevant evidence under the balancing test should be infrequent in light of the judgment of Congress that evidence of similar crimes "normally" should be admitted in child molestation cases.

In *State v. Bowen*, 299 Kan. 339, 323 P.3d 853 (2014), the court reiterated that, "In sex offense cases, propensity evidence is material, *i.e.*, has a 'legitimate and effective bearing' on defendants' guilt." The question this statement of the rule poses, of course, is "Propensity for what?" Is it a general propensity for any form of sexual misconduct or does there have to be some greater specificity that links to the circumstances of the case? In *Bowen*, the court makes the point that "the evidence here was probative of Bowen's propensity to commit the acts alleged by M.B. because the prior crimes were sufficiently similar to M.B.'s allegations. . . . These crimes each involved sexual acts or preparatory actions toward sexual acts with young girls, and one involved nonconsensual sexual contact. Evidence of these crimes made more probable the truth of the State's proposition that Bowen had a predisposition to sexually abuse female victims approximately the same age as M.B." This language could suggest that although the "striking similarity" requirement in earlier cases for other offenses used to show plan does not apply when evidence is offered for the propensity inference under subsection (d), the crimes still must be of a genre suggesting a propensity germane to the case.

The authority granted by K.S.A. 2013 Supp. 60-455(d) to admit evidence of another act or offense for the propensity inference when defendant is charged with a sex offense is limited to evidence of an act or offense of sexual misconduct, as defined in K.S.A. 2013

Supp. 60-455(g). In *State v. Breeden*, 297 Kan. 567, 304 P.3d 660 (2013), a prosecution for aggravated criminal sodomy with a child, the court declined to apply subsection (d) to evidence of defendant's threat to harm the victim and a nonsexual battery. Because the prosecution did not argue that subsection (d) applied, the court merely described the proposition that it did as "questionable."

D. *Other Considerations.* The trial court should consider several other issues relating to the introduction of other-crimes evidence under K.S.A. 60-455.

* *Notice.* Subsection (e), added in 2009, imposes an obligation on the prosecution to give pretrial notice of its intent "to offer evidence under this rule." One may expect defendants to argue that "this rule" is the entirety of K.S.A. 60-455, so that pretrial notice now is required whenever a prosecutor intends to offer evidence for any permissible purpose under K.S.A. 60-455, not just in prosecutions for sex offenses. The problem arises because both subsection (e) and subsection (f), which also uses the term "rule," were borrowed from Federal Rules 413(b) and (c) and 414(b) and (c). The references to "this rule" should have been changed to "subsection (d)" if the legislature intended to limit the notice requirement to prosecutions for sexual offenses, but they were not.

* *Conviction Not Required.* To be admissible under K.S.A. 60-455, it is not necessary for the State to show that the defendant was actually convicted of the other offense. *State v. Henson*, 221 Kan. at 644; *State v. Powell*, 220 Kan. 168, 172, 551 P.2d 902 (1976). The statute specifically includes other crimes or *civil wrongs*. An acquittal of the defendant of a prior offense does not bar evidence thereof where otherwise admissible; the acquittal bears only upon the weight to be given to such evidence. *State v. Searles*, 246 Kan. 567, 579, 793 P.2d 724 (1990).

* *Acquittal as a Collateral Estoppel.* *State v. King*, 299 Kan. 372, 323 P.3d 1277 (2014), discussed when the doctrine of collateral estoppel bars admission under K.S.A. 2014 Supp. 60-455(d) of evidence of another offense of sexual assault when defendant was acquitted of the offense. According to the court, collateral estoppel bars the evidence when "the prosecution in which defendant was acquitted had at its heart the same issue to be entrusted to the second jury." (Syl. ¶7). But collateral estoppel will not bar the evidence when it is offered for a different issue. In drawing this distinction, the court relied on *State v. Searles*, 246 Kan. 567, 793 P.2d 724 (1990) (prior acquittal based on defense of consent; issue in second trial was identity). The court in *King* instructed the trial judge to use this standard on retrial to determine whether evidence that defendant previously had sexually abused a young girl was barred by collateral estoppel when offered in a subsequent prosecution for sexual abuse of another young girl. The opinion does not cite *Dowling v. United States*, 493 U.S. 342, 110 S. Ct. 342, 107 L. Ed. 2d 708 (1990), and the court's test can be read to apply collateral estoppel more broadly than constitutionally required by *Dowling*. In *Dowling*, the prosecution offered testimony under Fed. R. Evid. 404(b) that defendant had participated in a prior home invasion for which he was acquitted. Collateral estoppel did not bar this testimony because the acquittal meant only that the prosecution failed in the earlier trial to prove defendant's guilt beyond a reasonable doubt. The burden of production to admit evidence under Rule 404(b) in a prosecution involving a different incident is much lower, only that there be proof from which the jury reasonably could conclude that the prior act occurred and that defendant committed the act. *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). The court in *Searles* cited *Dowling*, but only for its alternate holding that collateral estoppel would not apply on *Dowling's* facts even if the burden of proof was the same in both cases.

* *Standard of Proof of Other Crime.* No Kansas decision has determined whether the prima facie evidence standard of *Huddleston*, or some higher standard, applies in Kansas when evidence of prior crimes is offered for a purpose listed in K.S.A. 60-455.

* *Prior or Subsequent Crime.* Evidence of either prior or subsequent crimes may be introduced pursuant to K.S.A. 60 455 if the other requirements of admission are met. *State v. King*, 297 Kan. 955, 305 P.3d 641 (2013); *State v. Carter*, 220 Kan. 16, 23, 551 P.2d 851 (1976); *State v. Bly*, 215 Kan. at 176-177. But as discussed earlier, new subsection (c) purports to limit evidence offered to prove plan to evidence of prior crimes.

* *Remoteness in Time.* Remoteness in time of a prior conviction, if otherwise admissible, affects the weight of the prior conviction rather than its admissibility. *State v. Breazeale*, 238 Kan. 714, 723, 714 P.2d 1356 (1986). The probative value of a prior conviction progressively diminishes as the time interval between the prior crime and the present offense lengthens. *State v. Cross*, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski*, 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admission of 19-year-old conviction on collateral issue was reversible error). See also *State v. Carter*, 220 Kan. 16, 20, 551 P.2d 851 (1976) (proper admission of 7-year-old conviction); *State v. Finley*, 208 Kan. 49, 490 P.2d 630 (1971) (proper admission of 11- and 16-year-old convictions); *State v. O'Neal*, 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson*, 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction).

* *Admissibility as to One of Several Crimes.* Evidence of a prior offense need not be admissible as to every offense for which the defendant is being tried. *State v. McGee*, 224 Kan. 173, 177, 578 P.2d 269 (1978). In such instances, however, the trial court should instruct the jury as to the specific crime and element for which the evidence of a prior crime is being admitted.

* *Admission in Civil Cases.* K.S.A. 60-455 applies to civil as well as criminal cases. The trial court is given a wider latitude in admitting evidence of other crimes in civil cases. See *Frame, Administrator v. Bauman*, 202 Kan. 461, 466, 449 P.2d 525 (1969).

* *Presentation of Other Crimes in Case-in-Chief.* Evidence of other crimes admitted pursuant to K.S.A. 60-455 should be introduced in the State's case-in-chief or rebuttal rather than by cross-examination of the defendant. *State v. Quick*, 229 Kan. 117, 120-22, 621 P.2d 997 (1981); *State v. Harris*, 215 Kan. 961, 509 P.2d 101 (1974).

* *Hearsay Evidence.* Evidence of a hearsay statement that does not fit any hearsay exception is inadmissible to prove another crime or wrong that otherwise is admissible under K.S.A. 60-455(b) as relevant for a nonpropensity purpose. *State v. Seacat*, 303 Kan. 622, 366 P.3d 208 (2016).

III. ADMISSION FOR PURPOSES OTHER THAN THE EIGHT LISTED IN K.S.A. 60-455

A. *Separate Hearing Required.* As with evidence admitted for one of the eight purposes listed in K.S.A. 60-455(b), it is the better practice to determine the admissibility of evidence of other crimes for other relevant purposes in advance of trial and in the absence of the jury. See discussion in Section II.A., Separate Hearing Required.

B. *Other Categories of Admissible Evidence.* Because the list of permissible uses in K.S.A. 60-455(b) is illustrative only, evidence of other crimes or civil wrongs may be introduced, subject to the balancing test, whenever it is relevant for a non-propensity purpose, and also when there is express statutory authority. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006).

(1) *Rebuttal of Good Character Evidence.* Sections 60-446, 60-447 and 60-448 of the Kansas Code of Civil Procedure allow evidence to be introduced by the defendant regarding a trait of his or her character either as tending to prove conduct on a specified occasion or as tending to prove guilt or innocence of the offense charged. (See specifically, K.S.A. 60-447). Only after the defendant has introduced evidence of good character may the State introduce evidence relevant only to show a bad character trait of defendant on the issue of guilt. The State is limited in its use of specific instances of conduct for this purpose as follows:

(a) *Cross-Examination of Character Witness.* The State may cross-examine defendant's good character witnesses about defendant's prior convictions and specific instances of defendant's conduct that did not result in conviction, if they are inconsistent with the good trait of character offered by defendant. *State v. Hinton*, 206 Kan. 500, 479 P.2d 910 (1971), sets forth standards trial judges should use in determining whether to permit such cross-examination.

(b) *Evidence of Specific Instances of Bad Conduct.* In rebuttal, the State may prove prior convictions showing the trait to be bad but may not offer evidence of specific instances of conduct that did not result in conviction. K.S.A. 60-447.

(c) *Character Trait for Care or Skill.* Section 60-448 disallows the use of evidence of a character trait relating to care or skill to prove the degree of care or skill used by that person on a specified occasion.

See generally, *State v. Price*, 275 Kan. 78, 61 P.3d 676 (2003); *State v. Bright*, 218 Kan. 476, 477-479, 543 P.2d 928 (1975); Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. at 105-108.

(2) *Proof of Habit to Show Specific Behavior.* K.S.A. 60-449 and 60-450 make evidence of habit or custom, as distinguished from a trait of character, admissible to prove that behavior on a specified occasion conformed to the habit or custom. Evidence of other crimes or wrongs rarely will be admissible to prove the existence of a habit because they usually will not be sufficient in number to establish that a habit exists nor will they involve a sufficiently invariable response to a recurring, specific stimulus. See *State v. Gaines*, 260 Kan. 752, 765, 926 P.2d 641 (1996)(evidence of five instances of toe-sucking by defendant during marital intercourse over more than one year does not establish habit of toe-sucking during intercourse; number of instances insufficient and conduct not invariable practice).

(3) *Res Gestae.* The common law doctrine of *res gestae* once was used to justify admission of other crimes evidence without a limiting instruction. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), held that *res gestae* is not an independent basis for admission of evidence of other crimes and that admissibility must be determined by the same standards, including the determination of relevance and the balancing of probative value against prejudice, that apply to other crimes evidence generally. *Id.*

Recently, the court has recognized that K.S.A. 60-455(a) only excludes evidence of a crime or wrong "on a specified occasion" when it is used to infer a propensity to commit a crime or wrong "on another specified occasion." *State v. King*, 297 Kan.

955, 305 P.3d 641 (2013); *State v. Breeden*, 297 Kan. 567, 304 P.3d 660 (2013). Thus, the court in *King* concluded that 60-455 "does not apply if the evidence relates to crimes or civil wrongs committed as part of the events surrounding the crimes for which [defendant] was on trial." *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018), held that no limiting instruction is required in these circumstances. However, the court in *King* noted that under K.S.A. 60-407(f), the evidence still must be relevant and not be excluded by another rule, for example the one excluding evidence when probative value for the purpose for which the evidence is offered is substantially outweighed by the risk of unfair prejudice. Evidence that is relevant only to show a general propensity to commit crime fails the balancing test, except when new section 60-455(d) applies. See, e.g., *State v. Ward*, 31 Kan. App. 2d 284, 288, 64 P.3d 972 (2003), which held that mere temporal proximity of the other crime to the crime charged is insufficient to make the other crime relevant. The court reversed the trial court for admitting as *res gestae* evidence of a drug transaction that preceded the charged sex offense when the drug crime was "not logically related to one or more of the material facts in issue," since it did not explain why the charged crime occurred, did not facilitate it, and was not naturally, necessarily or logically connected with it or illustrative of it.

Of course, evidence of a contemporaneous uncharged crime often will be relevant for a non-propensity purpose, for example when evidence relevant to prove the crime charged necessarily discloses the other crime. See also *State v. Breeden*, *supra*, which observed that evidence of defendant's uncharged threat to a child explained in part the child's initial reluctance to tell his mother about defendant's sexual abuse.

(4) *Relationship or Continuing Course of Conduct Between Defendant and the Victim*. Evidence of prior acts of a similar nature between the defendant and the victim often is relevant to establish one of the eight factors listed in K.S.A. 60-455, such as motive. *State v. Vasquez*, 287 Kan. 40, 194 P.3d 563 (2008). While *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), rejects prior decisions freely admitting evidence of other crimes independently of K.S.A. 60-455 to prove marital discord, *Gunby's* characterization of the statute's eight listed non-propensity uses as illustrative only means there may be cases in which evidence of other acts showing marital discord may be relevant for an unlisted purpose. However, as in other cases, the trial court must determine the evidence is relevant other than by showing defendant's general propensity, e.g., for violence, and must balance probative value against prejudice.

State v. McHenry, 276 Kan. 513, 78 P.3d 403 (2003), explains more carefully than many earlier opinions why these non-propensity uses were relevant. The defense attacked the veracity of the victim and other family members, contending the rest of the family concocted allegations of sexual abuse to remove defendant from the home, and introduced evidence that the victim had stated she could get whatever she wanted from defendant by claiming he had sexually abused her. Evidence of the previous incidents thus aided the jury in assessing the defense by showing the timing of past complaints in the context of other family dynamics, that past complaints had not resulted in action by those in authority, and that a long-standing system of rewards might explain the victim's initial failure to come forward.

Evidence offered to show the existence of marital discord or specific marital problems must be analyzed under K.S.A. 60-455 only when the evidence shows commission by defendant of a "crime or civil wrong." Thus, in *State v. Campbell*, 308 Kan. 763, 423 P.3d 539 (2018), the court held the trial court was not required to apply K.S.A. 60-455 to testimony that defendant was "controlling" of his spouse and always

wanted to have his way. Given the "ups-and-downs" of a marriage, "there is a vast difference between 'problems' in a marriage and domestic violence or other acts that would qualify as other crimes or civil wrongs." The ordinary rules of relevance and materiality governed admissibility of the testimony in *Campbell*.

In *State v. Barber*, 302 Kan. 367, 353 P.3d 1108 (2015), the court held it was not "clear error" to instruct the jury it could consider other "bad acts" of shaking a baby to prove "the relationship of the parties and a continuing course of conduct." Because defendant did not object to the instruction, the court applied the "clearly erroneous" standard of review and rejected defendant's argument that the instruction permitted the jury to use the other acts for the propensity inference; the court concluded the instruction made clear to the jury "it could consider the evidence only for specified purposes not coextensive with prohibited propensity."

(5) *Other Crime as Element of Crime Charged*. Evidence of a prior conviction is relevant if proof of the prior conviction is an *essential* element of the crime charged. *State v. Knowles*, 209 Kan. 676, 679, 498 P.2d 40 (1972).

In *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999), the Kansas Supreme Court held that in a prosecution for criminal possession of a firearm, when requested by a defendant, the trial court must approve a stipulation whereby the parties acknowledge that the defendant is, without further elaboration, a prior convicted felon. The procedure for adopting the stipulation is set forth in the opinion. In *State v. Gill*, 268 Kan. 247, 997 P.2d 710 (2000), the Court confirmed that this procedure is only necessary when requested by a defendant.

(6) *Admissible Evidence of the Crime Charged which Discloses Other Crimes*. Evidence tending to establish the crime charged is not rendered inadmissible because it discloses the commission of another and separate offense. Testimony about other crimes may be admissible as a part of the background and circumstances when the defendant made damaging admissions which connected him with the crime charged. *State v. Schlicher*, 230 Kan. 482, 639 P.2d 467 (1982); *State v. Holt*, 228 Kan. 16, 612 P.2d 570 (1980), reaffirming *State v. Solem*, 220 Kan. 471, 552 P.2d 951 (1976). Such evidence need not be direct evidence of the charged crime. It may be circumstantial. *State v. Wilkerson*, 278 Kan. 147, Syl. ¶ 3, 91 P.3d 1181 (2004).

(7) *Rebuttal of Credibility Evidence*. After the defendant has introduced evidence at trial for the purpose of supporting his or her credibility, the trial court may allow the admission of evidence of prior convictions for the purpose of impeaching the defendant's credibility. K.S.A. 60-420, 60-421, and 60-422. The impeachment evidence must be limited to evidence of a *conviction* of a crime involving *dishonesty* or *false statement*. The crimes of larceny, theft, and receiving stolen property involve dishonesty and are admissible on the issue of credibility. *Tucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime" includes both felonies and misdemeanors. *Tucker v. Lower*, 200 Kan. at 5. See also *State v. Burnett*, 221 Kan. 40, 558 P.2d 1087 (1976); *State v. Werkowski*, 220 Kan. 648, 556 P.2d 420 (1976); *State v. Johnson*, 21 Kan. App. 2d 576, 907 P.2d 144 (1995).

(8) *Other Crimes of a Person Other Than a Defendant*. *State v. Bryant*, 228 Kan. 239, 613 P.2d 1348 (1980) held that K.S.A. 60-455 does not apply in a criminal case to a person other than the accused, and evidence that such a person may have committed a crime or civil wrong may not be introduced thereunder. Neither the text of K.S.A. 60-455(b) nor the policies underlying it support restricting admission of

prior crimes to those of the criminal defendant. Exclusion of evidence of third party crimes is justified in many cases for the distinct reason that the risk such evidence will mislead the jury or confuse the issues substantially outweighs its limited probative value, as where defendant offers evidence of other crimes to show a third party had a motive to kill the victim but offers no other evidence linking the third party to the crime. However, where there is conflicting evidence whether defendant or a third party killed the victim, evidence that the third party had killed others in the same distinctive way would be highly probative on the issue of identity. *Bryant* and related cases are criticized in Dennis Prater and Tammy M. Somogyi, *Some Other Dude Did It (But Will You Be Allowed to Prove It?)*, 65 J. KAN. B.A. 28, 35 (May 1998). Authority under the Federal Rules of Evidence counterpart to K.S.A. 60-455 admits third party crimes evidence in these circumstances. See 2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 404 [15], p. 404-94 (1995) ["A defendant in order to prove mistaken identity may show that other crimes similar in detail have been committed at or about the same time by some person other than himself," citing *United States v. O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978), and *Holt v. United States*, 342 F.2d 163, 166 (5th Cir. 1965)].

The Committee believes it is unlikely that the rule stated in *Bryant* survives the decision in *State v. Marsh*, 278 Kan. 520, 529-532, 102 P.3d 445 (2004), *reversed on other grounds sub. nom Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L.Ed.2d 429 (2006). *Marsh* recognized that the "probative values" of direct and circumstantial evidence are intrinsically similar and disapproved decisions suggesting that when the prosecution relies upon direct evidence, such as eyewitness identification, circumstantial evidence offered by defendant that the crime may have been committed by a third party is inadmissible. The court limited the application of this so-called "third-party evidence rule" by tracing its origins to *State v. Neff*, 169 Kan. 116, Syl. ¶ 7, 218 P.2d 248, *cert. denied*, 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed. 632 (1950), which stated the rule as follows: "Where the State relies on direct rather than on circumstantial evidence for conviction, evidence offered by defendant to indicate a *possible motive* of someone other than defendant to commit the crime is incompetent *absent some other evidence to connect the third party with the crime*." Evidence of the third party's motive alone would confuse the jury and permit it to indulge in speculation on collateral matters. Henceforth, "circumstantial evidence connecting a third party to a crime will not be excluded merely because the State relies upon direct evidence of the defendant's guilt." There is no bright line rule and admissibility is dependent upon the totality of circumstances. See also *State v. Evans*, 275 Kan. 95, 105, 63 P. 3d 220 (2003), which held that even when the State offers direct evidence from an eyewitness, "Circumstantial evidence that would be admissible and support a conviction if introduced by the State cannot be excluded by a court when offered by the defendant to prove his or her defense that another killed the victim." While neither *Marsh* nor *Evans* involved evidence of third party crimes, their reasoning applies to such cases. See also *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

Evidence of prior criminal convictions of a witness against a criminal defendant is subject to the restrictions found in K.S.A. 60-421. The credibility of a witness can only be impeached by crimes involving dishonesty or false statement.

(9) *Rebuttal of Entrapment Defense*. If the defendant introduces evidence to establish the defense of entrapment (K.S.A. 21-3210), the State may introduce relevant

evidence of the defendant's prior disposition to commit such crimes. *State v. Amodei*, 222 Kan. 140, 142-143, 563 P.2d 440 (1977); *State v. Reichenberger*, 209 Kan. 210, 495 P.2d 919 (1972). See also Note, *Criminal Law: Kansas' Statutory Entrapment Defense in Narcotic Sales Cases*, 12 Washburn L. J. 231 (1973); Note, *The Entrapment Defense in Kansas: Subjectivity Versus an Objective Standard*, 12 Washburn L. J. 64 (1972).

(10) *Rebuttal of Specific Statement.* The State may introduce evidence of other crimes to specifically rebut the incorrect testimony of a witness tending to establish a defense. *State v. Thompkins*, 263 Kan. 602, 621-25, 952 P.2d 1332 (1998); *State v. Burnett*, 221 Kan. 40, 42-43, 558 P.2d 1087 (1976); *State v. Faulkner*, 220 Kan. at 158-159. The use and extent of rebuttal evidence rests in the sound discretion of the trial court. *State v. Thompkins*, 263 Kan. at 623.

State v. Everett, 296 Kan. 1039, 297 P.3d 292 (2013), limits the extent to which details of a criminal defendant's other crimes may be proved when defendant "opens the door" by referring to a conviction or probationary status. In *Everett*, defendant, charged with manufacturing methamphetamine, introduced accurate evidence that he was on probation and participating in a community corrections program at the time. This evidence was essential to his defense that drug testing done for the program refuted an alleged accomplice's claim that they had consumed meth together after making it. On the theory that defendant had opened the door on the subject, the trial court permitted the prosecution to show that defendant was on probation because he had been convicted for possession of drug paraphernalia to manufacture methamphetamine. The Supreme Court held that even when defendant opens the door, the trial court must conduct an analysis under K.S.A. 60-455. In *Everett*, the only relevance of the details of defendant's prior conviction was to show defendant's propensity to manufacture meth, the use prohibited by K.S.A. 60-455(a). Defendant's evidence that he was on probation did not waive the protection of the statute. "General information that a defendant has committed a previous crime is far different from evidence of the exact nature of the prior crime, at least under the specific facts of this case." The prosecution did not dispute the veracity of defendant's evidence about his probation or participation in the community corrections program, "which is another way of saying that it does not seek to impeach Everett's testimony. If it did, the impeachment evidence might be material rebuttal evidence." Thus, if defendant misrepresented his criminal history, for example by testifying "I've never been convicted of anything like this," *Everett* would not preclude the prosecution from proving a conviction for a similar offense. As Judge Greene observed in his dissent in *Everett* in the Court of Appeals, "the consequences of opening the door should be commensurate with the degree it has been opened."

IV. CONCLUSIONS AND RECOMMENDATIONS

The trial court should use great caution in admitting evidence of other crimes. There will be a great temptation by prosecutors to introduce prior-crimes evidence to secure convictions. The trial court must be aware of the high degree of prejudice inherent in any evidence of other crimes. This prejudice must be weighed against the probative value of the evidence. Where the evidence is offered pursuant to K.S.A. 60-455, the other parts of the three-part test must be applied. In addition, other-crimes evidence should not be admitted where the other evidence of guilt is overwhelming and the prior-crimes evidence would serve only as an overkill mechanism.

51.040

**MORE THAN ONE DEFENDANT—LIMITED
ADMISSIBILITY OF EVIDENCE**

You should give separate consideration to each defendant. Each is entitled to have (his) (her) case decided on the evidence and the law which is applicable to (him) (her).

Any evidence which was limited to insert name of specific defendant should not be considered by you as to any other defendant.

Notes on Use

This instruction should be given only when there is more than one defendant. See K.S.A. 22-3204, Joinder of defendants; separate trials.

Comment

In *State v. Cameron & Bentley*, 216 Kan. 644, 533 P.2d 1255 (1975), this instruction was approved as appropriate to give in a case of multiple defendants charged in the same information.

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51.050

DEFENSES—BURDEN OF PROOF

The defendant raises describe the defense claimed as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State has the burden to disprove this defense beyond a reasonable doubt. The State's burden of proof does not shift to the defendant.

Notes on Use

For authority, see K.S.A. 21-5108(c). This instruction should be given only when there is competent evidence that could allow the jury reasonably to conclude that the defense applies.

This instruction should be given in connection with the instruction defining the applicable defense. See *e.g.*,

- 52.040 Intoxication—Involuntary
- 52.080 Compulsion or Threat Defense
- 52.090 Ignorance or Mistake of Fact or Law
- 52.100 Ignorance or Mistake of Law—Reasonable Belief
- 52.110 Entrapment
- 52.200 Use of Force in Defense of a Person
- 52.210 Use of Force in Defense of a Dwelling, Place of Work, or Occupied Vehicle
- 52.220 Use of Force in Defense of Property Other Than a Dwelling, Place of Work, or Occupied Vehicle
- 53.050 Conspiracy—Withdrawal as a Defense
- 53.100 Criminal Solicitation—Defense
- 54.311 Parental Discipline Defense to Battery or Aggravated Battery
- 54.390 Defense to Mistreatment of Dependent Adult or Elder Person (See Notes on Use to PIK 4th 54.390)
- 55.040 Rape—Defense of Marriage
- 55.080 Defense to Criminal Sodomy/Aggravated Criminal Sodomy
- 55.130 Defense to Indecent Liberties With a Child/Aggravated Indecent Liberties With a Child
- 56.030 Defense to Endangering a Child

- 56.140 Furnishing Alcoholic Liquor or Cereal Malt Beverage to a Minor—Defense
- 56.170 Defense to Bigamy
- 58.290 Worthless Check—Defenses
- 58.470 Computer Crime—Defense
- 60.040 Compensation for Past Official Acts—Defense
- 63.090 Weapons Crimes—Defenses
- 64.050 Promoting Obscenity—Defenses
- 64.060 Promoting Obscenity to a Minor—Defenses
- 64.150 Dealing in Gambling Devices—Defense
- 64.170 Possession of a Gambling Device—Defense
- 64.200 Cruelty to Animals—Defense
- 66.130 Defense to Driving While License is Canceled, Suspended or Revoked

The instructions listed in this Notes on Use are based almost exclusively on statutes creating affirmative defenses. However, the criminal code does not abolish common law defenses. *State v. Wade*, 45 Kan. App. 2d 128, 245 P.3d 1038 (2010) (recognizing common law affirmative defense of parental discipline to a charge of battery).

Comment

State v. Wilson, 240 Kan. 607, 610, 731 P.2d 306 (1987), held it was error to delete from this instruction the sentence, "The State's burden of proof does not shift to the defendant."

In *State v. Crabtree*, 248 Kan. 33, 40, 805 P.2d 1 (1991), the Court reaffirmed that "P.I.K. Crim. 3d 52.08 should be given whenever an affirmative defense is asserted in a criminal case." However, the court held that if other instructions such as P.I.K. 52.02 are given and these instructions make it clear that the burden of proof is on the State, then the failure to give 52.08 is not clearly erroneous. This was reemphasized in *State v. Cooperwood*, 282 Kan. 572, 147 P.3d 125 (2006).

Alibi is not an affirmative defense. *State v. Holloman*, 17 Kan. App. 2d 279, 837 P.2d 826 (1992).

"[A] true affirmative defense does not serve to disprove an essential element of the crime, but merely consists of facts which might exonerate a defendant." *State v. Kershner*, 15 Kan. App. 2d 17, 19, 801 P.2d 68 (1990).

Killing another in the heat of passion or upon a sudden quarrel is not an affirmative defense, and the trial court was not required to give PIK 3d 52.08. *State v. Saenz*, 271 Kan. 339, 353, 22 P.3d 151 (2001).

A defendant is entitled to an instruction on a theory of defense only when there is evidence, viewed in the light most favorable to the defendant, sufficient to justify a finding in accordance with defendant's theory. *State v. Anderson*, 287 Kan. 325, 334, 197 P.3d 409 (2008).

K.S.A. 21-5108(c) "codified the caselaw requirement that, once a defendant properly asserts a self-defense affirmative defense, the State must disprove the defense beyond a reasonable doubt." *State v. Staten*, 304 Kan. 957, 377 P.3d 427 (2016). However, the amendment "did not alter the law in Kansas concerning the State's burden of proof, and it did not create a new element that the State must prove when charging a crime."

51.060

CREDIBILITY OF WITNESSES

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

Notes on Use

This instruction should be given in every criminal case. See K.S.A. 22-3415, Laws applicable to witnesses. See K.S.A. 60-417, Disqualification of witness; interpreters. See also K.S.A. 60-419, 420, 421 and 422 covering necessity of knowledge or experience on the part of a witness, evidence relating to credibility, limitation on evidence of conviction of crimes, and other limitations on admissibility of evidence affecting credibility.

The Committee recommends that this instruction be given without any expansion.

Comment

This instruction was impliedly approved in *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976); and in *State v. Mack*, 228 Kan. 83, 89, 612 P.2d 158 (1980).

See also *State v. Pioletti*, 246 Kan. 49, 58, 785 P.2d 963 (1990), *State v. Land*, 14 Kan. App. 2d 515, 519, 794 P.2d 668 (1990).

While not clearly erroneous, expansion of this instruction generally is not approved. *State v. Hunt*, 257 Kan. 388, 849 P.2d 178 (1995). Where objection to expanding the instruction was made in *State v. DeVries*, 13 Kan. App. 2d 609, 617-19, 780 P.2d 1118 (1989), the expansion was held to be reversible error. See also *State v. Hartfield*, 245 Kan. 431, 449, 781 P.2d 1050 (1989), where objection was made to expanding this instruction by adding the "false in one thing, false in all" concept. While such expansion was noted as less preferable than using this instruction, it was held not to be reversible error because of the particular circumstances existing in the case.

State v. Cox, 297 Kan. 648, 304 P.3d 327 (2013), held the trial court did not commit error when it refused to instruct the jury that "Evidence of good character alone may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of good character would commit such a crime." The legally appropriate substance of the requested instruction "was covered by other PIK instructions, including the general witness credibility instruction" in PIK Crim. 3d 52.09 (now PIK Crim. 4th 51.060).

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51.070

TESTIMONY TAKEN BEFORE TRIAL

During this trial, evidence was presented by the reading of testimony of a witness taken under oath at another time and place. It is to be weighed by the same standards as other testimony.

Notes on Use

It is recommended that a similar instruction be given before any recorded testimony is read.

For authority relating to the taking and use of depositions, see K.S.A. 22-3211, which provides that civil rules apply in taking depositions.

Comment

This instruction does not have to be given where the transcript of the preliminary examination is used to impeach a witness. *State v. Trotter*, 245 Kan. 657, 666, 783 P.2d 1271 (1989).

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51.080

DEFENDANT'S FAILURE TO TESTIFY

A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference of guilt from the fact that the defendant did not testify, and you must not consider this fact in arriving at your verdict.

Notes on Use

For authority, see K.S.A. 60-439. This instruction should not be given unless there is a specific request by the defendant.

Comment

In *State v. Perry*, 223 Kan. 230, 573 P.2d 989 (1977), the court held that a trial court should not give this instruction unless it was requested by the defendant. Giving the instruction, however, was considered not prejudicial and not reversible error. See also *State v. Goseland*, 256 Kan. 729, 887 P.2d 681 (1994) (giving this instruction without a request from the defendant is not clearly erroneous).

This instruction was modified to comply with *City of Colby v. Cranston*, 27 Kan. App. 2d 530, 7 P.3d 300 (2000). In that case, following *Carter v. Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), the Court of Appeals held that once a criminal defendant requests a prophylactic instruction regarding his or her silence, the full and free exercise of the constitutionally guaranteed privilege against self-incrimination requires an instruction with two components: (1) a statement that the defendant cannot be compelled to testify, and (2) a statement that no adverse inference can be drawn from the defendant's silence.

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51.090

TESTIMONY OF AN ACCOMPLICE

An accomplice witness is one who testifies that (he) (she) was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice.

Notes on Use

This instruction was approved in *State v. Schlicher*, 230 Kan. 482, 494, 639 P.2d 467 (1982). Whether or not an accomplice's testimony is corroborated, the better practice is for the trial court to give a cautionary instruction. This instruction should not be given when the accomplice is also a co-defendant in the same trial.

Comment

Whether a cautionary instruction relating to the testimony of an accomplice is required depends upon several factors including whether the testimony is corroborated and whether such an instruction is requested by the defendant.

Older case law indicated that there was no duty to give a cautionary instruction if there was no request for such an instruction, even though the testimony of the accomplice was uncorroborated and was sufficient to convict. *State v. Stiff*, 148 Kan. 224, 80 P.2d 1089 (1938). However, in *State v. Moore*, 229 Kan. 73, 80, 622 P.2d 631 (1981), the Court concluded: "When an accomplice testifies, and whether that testimony is corroborated or not, the better practice is for the trial court to give a cautionary instruction. If the instruction is requested and is not given, the result may be in error. Whether the error is prejudicial and reversible, however, must be determined upon the facts of the individual case."

Where a defendant does not request a cautionary instruction on accomplice testimony, the failure of the court to give such an instruction will not be disturbed unless it is clearly erroneous. *State v. Thomas*, 252 Kan. 564, 847 P.2d 1219 (1993).

If the accomplice testimony is fully corroborated, and there is a request for a cautionary instruction, the failure to give such an instruction is not reversible error. *State v. Wood*, 196 Kan. 599, 413 P.2d 90 (1966).

If the accomplice testimony is partially corroborated, and there is a request for a cautionary instruction, failure to give such an instruction is error, but may or may not be reversible error depending upon what other cautionary instructions were given. *State v. Moody*, 223 Kan. 699, 576 P.2d 637 (1978). See also *State v. Crume*, 271 Kan. 87, 93-95, 22 P.3d 1057 (2001); *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *State v. Ferguson*, 228 Kan. 522, 618 P.2d 1186 (1980).

An accomplice instruction is proper even when the accomplice testimony is favorable to a criminal defendant and the defendant objects to the giving of the instruction. *State v. Anthony*, 242 Kan. 493, 749 P.2d 37 (1988); *State v. Smith*, 296 Kan. 111, 293 P.3d 669 (2013) (not error to give this instruction despite defense argument that it implied the testimony of nonaccomplice jailhouse informants should not be weighed with caution).

It is clearly erroneous to give an accomplice instruction when the accomplice is also a co-defendant, and the instruction is not neutral or singles out the accomplice co-defendant. *State v. Land*, 14 Kan. App. 2d 515, 794 P.2d 668 (1990) (no objection made to the instruction). An accomplice is a co-defendant only when the guilt or innocence of the accomplice will be determined by the jury that hears the accomplice's testimony. *State v. Dominguez*, 299 Kan. 567, 328 P.3d 1094 (2014).

In *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006), the court held that a witness is not an accomplice within the meaning of PIK 3d 52.18 merely because the witness was present during the crime and failed either to stop the crime or to report it to the police. Likewise, a witness who is only an accessory after the fact and who is not involved in the actual commission of the crime is not an accomplice. Under these facts, the trial court did not err in failing to instruct the jury on the testimony of an accomplice. *Simmons* explained that a person is an accomplice "if, with the intent to promote or facilitate the commission of the crime, he solicits, requests, or commands the other person to commit it, or aids the other person in planning or committing it." See also *State v. Llamas*, 298 Kan. 246, 311 P.3d 399 (2013).

It is inappropriate to give PIK 3d 52.18 unless there is evidence the witness has been involved in the commission of the crime with which the defendant is charged. *State v. Davis*, 283 Kan. 569, 580, 158 P.3d 317 (2006).

51.100

INFORMANT TESTIFYING IN EXCHANGE FOR BENEFITS

You should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence.

Notes on Use

This instruction must be given if requested when an informant's testimony is substantially uncorroborated. *State v. Fuller*, 15 Kan. App. 2d 34, 41, 802 P.2d 599 (1990).

See Comments below for the definition of "informant."

Comment

Ordinarily, it is error to refuse to give a cautionary instruction on the testimony of a paid informant or agent where such testimony is substantially uncorroborated and is the main basis for defendant's conviction. Where, however, no such instruction is requested nor objection made to the court's instructions, and such testimony is substantially corroborated, the absence of a cautionary instruction is not error and is not grounds for reversal of the conviction. *State v. Novotny*, 252 Kan. 753, 760, 851 P.2d 365 (1993). Also see *State v. Brinkley*, 256 Kan. 808, 888 P.2d 819 (1995).

The cautionary instruction for paid informants is not necessary where the informant is a Drug Enforcement Agency agent on special assignment and paid a salary because the agent is not a "paid informant whose remuneration was tied to the sale of specific information, nor was he a participant in the crime with a promise of immunity." *State v. Gumbrel*, 20 Kan. App. 2d 944, 894 P.2d 235 (1995).

"An informant is an 'undisclosed person who confidentially discloses material information of a law violation, thereby supplying a lead to officers for their investigation of a crime. [Citation omitted.] This does not include persons who supply information only after being interviewed by police officers, or who give information as witnesses during the course of investigations' Black's Law Dictionary 780 (6th ed. 1990)." *State v. Abel*, 261 Kan. 331, 336, 932 P.2d 952 (1997). *State v. Noriega*, 261 Kan. 440, 932 P.2d 940 (1997), *State v. Bornholdt*, 261 Kan. 644, 932 P.2d 964 (1997), and *State v. Kuykendall*, 264 Kan. 647, 654, 957 P.2d 1112 (1998).

In *State v. Barksdale*, 266 Kan. 498, 514, 973 P.2d 165 (1999), the court expanded the definition of informant to include a disclosed person. Whether disclosed or undisclosed, in order to qualify as an informant, the person must act as an agent for the State in procuring information. *State v. Saenz*, 271 Kan. 339, 346-48, 22 P.3d 151 (2001). In *State v. Conley*, 270 Kan. 18,

24-25, 11 P.3d 1147 (2000), the court emphasized that an instruction on the testimony of an informant is unnecessary unless the person actually receives a benefit from the State in exchange for information. In this case, a prison inmate contacted the prosecutor's office and offered information about the defendant in the hope of receiving a reduction in his prison time. Although the inmate testified, he did not receive a sentence reduction or any other benefit from the State in exchange for the testimony. The court ruled that, under these facts, the witness was not acting as an informant for the State.

In *State v. Lowe*, 276 Kan. 957, 963-64, 80 P.3d 1156 (2003), the court determined that an instruction on the testimony of an informant is unnecessary unless the witness was acting as an agent for the State *at the time the witness gained information* about the defendant. A witness who gains information about the defendant and later offers the information to the police in exchange for benefits is not considered an informant within the meaning of PIK 3d 52.18-A.

This instruction is not appropriate when information is passed to a witness when the witness is not serving as an agent of the State. *State v. Ashley*, 306 Kan. 642, 396 P.3d 92 (2017) (prison informant not contacted by State or intentionally given role of investigator; not placed in holding area to obtain information from defendant).

The court has held it is permissible, but not legally required, for the trial court "to instruct the jury to view with caution the testimony of a noninformant witness who is, nonetheless, testifying in exchange for benefits from the State." *State v. Dean*, 310 Kan. 848, 450 P.3d 819 (2019); *State v. Allison*, 259 Kan. 25, 910 P.2d 817 (1996) (not error to instruct: "You should consider with caution the testimony of a witness who, in exchange for benefits from the State, testifies in behalf of the State, if that testimony is not supported by other evidence.").

51.110

EYEWITNESS IDENTIFICATION

The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove (he) (she) has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

- 1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;**
- 2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;**
- 3. Whether the witness had observed the defendant(s) on earlier occasions;**
- 4. Whether a significant amount of time elapsed between the crime charged and any later identification;**
- 5. Whether the witness ever failed to identify the defendant(s) or made any inconsistent identification;**
- 6. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification.**

Notes on Use

This instruction should be given whenever the trial judge believes there is any serious question about the reliability of eyewitness identification testimony. *State v. Willis*, 240 Kan. 580, 731 P.2d 287 (1987). However, unless there is evidence which causes the trial court to question the reliability of the eyewitness identification, this instruction should not be given. *State v. Harris*, 266 Kan. 270, 278, 970 P.2d 519 (1998). A cautionary instruction is required only when the eyewitness identification is critical to the prosecution's case. *State v. Thurber*, 308 Kan. 140, 420 P.3d 389 (2018).

Comment

The appropriateness of this type of instruction was indicated by our Supreme Court in *Haines v. Goodlander*, 73 Kan. 183, 84 Pac. 986 (1906). In *Haines*, the Court stated that to comment by way of indicating to a jury the weight to give particular evidence would not be allowable, but "[Y]et there is no reason why the court should not in some cases refer to particular parts of the evidence and advise the jury as to the rules of law applicable to such facts." 73 Kan. at 190-191.

State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981), sets forth "rules of law applicable to" facts attending eyewitness identifications. If "eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of the eyewitness identification testimony." 230 Kan. at 397.

In *State v. Simpson*, 29 Kan. App. 2d 862, 32 P.3d 1226 (2001), the court held that failure to give the eyewitness identification instruction was clearly erroneous, and reversed a conviction even though the instruction was not requested at trial. The court found under the facts of the case that the eyewitness identification was a critical part of the prosecution's case and there was a serious question about the reliability of the identification.

In *State v. Mann*, 274 Kan. 670, 56 P.3d 212 (2002), the court held in any criminal action in which eyewitness identification is a critical part of the prosecution's case and there is serious questions about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of the eyewitness identification testimony. However, where the witness personally knows the individual being identified, the cautionary eyewitness identification instruction is not necessary and the accuracy of the identification can be sufficiently challenged through cross-examination.

Kansas previously applied the factors in *Neil v. Biggers*, 409 U.S. 188, 199-20, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972), to evaluate the reliability of an eyewitness identification. *State v. Hunt*, 275 Kan. 811, 69 P.3d 571 (2003), dealt with admissibility of eyewitness identification and not the sufficiency of the jury instruction. *Hunt* adopted the factors in *State v. Ramirez*, 817 P.2d 774 (Utah 1991). In *Ramirez*, the court enumerated five factors for evaluating the reliability of eyewitness identifications: (1) the opportunity of the witness to view the actor during the event; (2) the witness' degree of attention to the actor at the time of the event; (3) the witness' capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly. In *Hunt*, the court stated, "[O]ur acceptance [of the *Ramirez* model] should not be considered as a rejection of the *Biggers* model, but, rather, as a refinement in the analysis."

In *State v. Calvin*, 279 Kan. 193, 205-07, 105 P.3d 719 (2005), the court held the factors set out in PIK 3d 52.20 contemplate an eyewitness who does not know the defendant personally. Where the eyewitness personally knows the individual being identified, the cautionary eyewitness identification instruction is not necessary. The accuracy of the identification can be sufficiently challenged through cross-examination.

The Kansas Supreme Court held that former factor 6 should be deleted from PIK 3d 52.20. Instructing the jury that the degree of certainty expressed by the witness at the time of an identification of the defendant is a factor they should weigh when evaluating the reliability of

that eyewitness testimony prompts the jury to conclude that eyewitness identification evidence is more reliable when the witness expresses greater certainty. *State v. Anderson*, 294 Kan. 450, 276 P.3d 200 (2012); *State v. Mitchell*, 294 Kan. 469, 275 P.3d 905 (2012).

Factor (6) in the current instruction is a catchall, covering any other circumstance that may affect the identification. Thus, it is not necessary to list or highlight in the instruction other factors, such as the difference in the race of the witness and the defendant. Counsel is free in closing argument to argue any factor supported by the evidence. *State v. Carr*, 300 Kan. 1, 235, 331 P.3d 544 (2014).

State v. Carr, supra, rejects Kansas precedent applying an automatic rule of exclusion of testimony of a qualified expert witness describing factors that may make eyewitness identifications unreliable. The requirement in K.S.A. 60-456(b) that an expert's testimony must "help the trier of fact to understand the evidence or to determine a fact in issue" may be met when the trier of fact is not well versed in scientifically documented tendencies and conclusions about eyewitness identifications, for example about the rapidity of memory decay or how memory becomes polluted by outside information over time. *Carr* adopts a flexible approach, requiring individual evaluation by the judge, in light of the testimony in each case and the circumstances of the identification, whether the proffered expert testimony will be helpful to the jury. In *Carr*, given the number of hours one person who identified defendants was in the presence of her intruders, the court concluded the exclusion of expert testimony did not affect the outcome on charges to which that identification related.

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51.120

HEARSAY EVIDENCE OF CHILD VICTIM OR CHILD IN NEED OF CARE WHO IS UNAVAILABLE OR DISQUALIFIED

It is for you to determine what weight and credit to give the statement claimed to have been made by insert name of the child. You should consider (his) (her) age and maturity, the nature of the statement, the circumstances existing when it was claimed to have been made, any possible threats or promises that may have been made to (him) (her) to obtain the statement, and any other relevant factors.

Notes on Use

By statute, this instruction must be given when hearsay evidence is admitted solely under K.S.A. 60-460(dd). If the evidence is admitted under another hearsay exception, the statute does not require this instruction to be given.

K.S.A. 60-460(dd) applies only in (a) a criminal or juvenile offender proceeding if the declarant is a child who is alleged to be a victim of the crime or offense charged or (b) a proceeding to determine if the declarant is a "child in need of care."

Before admitting evidence under K.S.A. 60-460(dd), the judge must hold a hearing and determine that (a) the child is disqualified or unavailable as a witness, (b) the statement is apparently reliable, and (c) the child was not induced to make the statement(s) falsely by use of threats or promises.

Comment

State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985) lists the factors a court should consider in evaluating the credibility and trustworthiness of a child witness. In accord, see *State v. Clark*, 11 Kan. App. 2d 586, 730 P.2d 1104 (1986), which provides that PIK 2d 52.21 should be given when a child hearsay statement is admitted pursuant to K.S.A. 60-460(dd) because a general witness instruction does not adequately focus the jury upon a child's hearsay testimony and is inadequate to advise a jury of the factors to be considered in assessing child hearsay testimony.

The Sixth Amendment may bar the admission of "testimonial" hearsay against a criminal defendant or juvenile offender even if the prerequisites in K.S.A. 60-460(dd) are met. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), held the right of confrontation is violated by the admission of a "testimonial" hearsay statement made by a declarant who cannot be, or has not been, cross-examined about the statement, even if it has particularized guarantees of trustworthiness. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006),

adopted an objective test to determine whether statements made in response to questions by police are testimonial. They are nontestimonial when circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.

Subsequent decisions refined the "primary purpose" test, but for eleven years, all post-*Crawford* decisions involved either hearsay statements (1) by persons not associated with law enforcement made to police officers or law-enforcement personnel or (2) by law-enforcement personnel. In *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015), the court for the first time determined whether a statement to a person who was not a law-enforcement officer was testimonial. Teachers at a preschool observed that a three-year old child's eye appeared bloodshot and there were red marks on the child's face. When a teacher asked the child "Who did this? What happened to you?", the child identified defendant, who lived with the child's mother and was caring for the child while the mother was away. Other injuries suggesting child abuse of the three-year old and his younger sister were discovered thereafter. By statute, state law presumed a child under ten years old was incompetent to testify, and the trial court after a hearing determined the three-year old was incompetent and admitted the child's statement as reliable under a hearsay exception similar to K.S.A. 60-460(dd). The Supreme Court unanimously held the child's identification of defendant was not testimonial, but the six-Justice majority opinion left a number of questions unanswered. The Court acknowledged that "some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns," but noted that a statement to "someone who is not principally charged with uncovering and prosecuting criminal behavior is significantly less likely" to meet the Court's primary purpose test to be testimonial. Further, "statements by very young children will rarely, if ever, implicate the Confrontation Clause;" few preschool children understand the criminal justice system and it is extremely unlikely the three-year old intended his statements to be a substitute for trial testimony. Applying the primary purpose test to the totality of the circumstances, the Court characterized the statement as occurring in the context of an ongoing emergency, immediately after the teachers noticed the injuries, in the informal setting of a preschool lunchroom and classroom, and when the teachers did not know the identity of the abuser or whether other children were at risk and needed to know whether it was safe to release the child to his guardian at the end of the day. The teachers' immediate concern was to protect a vulnerable child who needed help, not to gather evidence for prosecution of defendant. They did not inform the child that his statements would be used to arrest or punish his abuser. The relationship of teacher and student differs from the relationship of a citizen and the police. The fact that, by statute, the teachers were required to report cases of suspected child abuse to authorities did not make them agents of law enforcement or change the primary purpose of their questioning.

Decisions before 2015 will need to be reevaluated in light of *Clark*. *State v. Henderson*, 284 Kan. 267, 160 P.3d 776 (2007), applied an objective, totality of the circumstances test to find that a videotaped interview of a three-year-old purported victim of child abuse was testimonial. The interview was conducted by an SRS social worker and a police detective after the child was diagnosed with gonorrhea. The child-declarant's lack of awareness that her statement could be used to prosecute is not dispositive and protection of the child may have been one purpose of the interview. However, various factors led the court to reject the argument that was its primary purpose; there was no ongoing emergency since the alleged perpetrator had not been in the victim's home for more than two weeks; the interview was conducted in a formal setting and in a government building; the information the interviewers had before the interview began caused them to focus their questions upon defendant and this focus was confirmed by the lack

of questions on other matters; the presence of the victim's mother, from whom gonorrhea could have been transmitted, suggested the interviewers were not considering other sources; the actions of the interviewers after the interview suggested their focus was upon prosecution. The focus upon defendant is not conclusive but it is an important factor. The opinion does not definitively resolve whether the interview would have been deemed testimonial if the police officer had not been present but the court does observe that "While...the main interviewer was an SRS employee, she could be considered an agent of law enforcement."

Two Kansas Supreme Court decisions applied *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L. Ed. 2d 93 (2011), to determine whether victims' statements to a Sexual Assault Nurse Examiner (SANE) were testimonial. The decisions illustrate how case specific and fact specific the determination has become. *State v. Bennington*, 293 Kan. 503, 264 P.3d 440 (2011), held one victim's statements to be testimonial while *State v. Miller*, 293 Kan. 535, 264 P.3d 461 (2011), held another victim's statements not to be testimonial.

In *Bennington*, the victim's statements were made in an emergency room, where she was taken by ambulance after the sexual assault and received treatment. Nevertheless, the court found that her description of what happened to her was testimonial because a law enforcement officer was present during her narrative and asked the victim a few specific questions. While one purpose of taking the history was to aid medical treatment, the officer's presence blurs the "primary purpose" of the interview since the officer's presence was not necessary for medical purposes. The officer listened to the victim's account of past events with, from an objective viewpoint, "an eye toward gathering information relevant to prosecution." The setting was more "formal" than in *Bryant* and there was no indication of an ongoing public safety or law enforcement emergency – the perpetrator had fled hours before the interview. The court acknowledged statements sometimes must be analyzed question by question because the purpose of an interview may transition. In *Bennington*, however, the SANE's notes incorporated all of the victim's responses and did not distinguish information that responded to the officer's questions.

Bennington also held to be testimonial subsequent statements to the SANE responding to questions the SANE asked from a questionnaire in the KBI sexual assault evidence kit. The SANE was following a statutorily prescribed protocol seeking a description of the perpetrator and similar information not needed for medical treatment. Even if a SANE is a non-State actor, the SANE is an agent of law enforcement when following statutory procedures for evidence gathering and asking questions prepared by the KBI.

In *Miller*, in contrast, the court held statements to a SANE by a four-year-old victim were not testimonial. The court concluded that medical treatment, rather than prosecution, was the primary purpose of questions and statements that referred only to the parts of the victim's body that had been touched or penetrated and did not identify the perpetrator. The victim had complained of discomfort and her mother decided to seek medical treatment without any request by law enforcement officers for an examination. A key distinction from *Bennington* is that no law enforcement officer participated in the questioning and an officer already had conducted interviews. While a SANE's "inquiries made solely for the purpose of recording answers on a KBI form would produce testimonial statements in most circumstances," the record was unclear whether the statements were in response to the questionnaire. "Inquiries made for the sole purpose of medical treatment, or even for a dual purpose that includes treatment, may produce nontestimonial statements, depending on other circumstances." Patients objectively expect the question "what happened" at the beginning of an examination, as in this case. While there was no ongoing emergency or threat to the victim, law enforcement, or the public — defendant was a family acquaintance — the existence of an emergency is less relevant to the determination whether a statement made to a medical professional is for treatment rather than prosecution.

While the SANE testified that part of her role was to collect evidence, and she asked questions to learn "where on the body I need to collect evidence," under *Bryant* the relevant inquiry is not the subjective purpose of the individual involved by objectively what "reasonable participants — both interrogator and declarant — would have viewed as the purpose."

Giles v. California, 554 U.S. 353, 171 L. Ed. 2d 488, 128 S.Ct. 2678 (2008), acknowledges that the doctrine of forfeiture by wrongdoing may apply to admit testimonial hearsay in domestic violence cases when defendant procures or coerces the victim's silence. Under *Giles*, it is not sufficient to invoke the doctrine of forfeiture regarding testimonial hearsay for the trial court to find by a preponderance of the evidence that defendant committed the murder for which defendant is on trial, thereby causing the declarant to be unavailable to testify, if the murder was not committed to prevent the witness from testifying. However, the court observed:

"acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal proceedings. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution — rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

The rule in *Giles* will not limit the admission of non-testimonial statements in domestic violence proceedings, such as "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment." The hearsay rule exclusively governs the admission of such statements. The court notes that a state would be free to admit non-testimonial hearsay by applying a broader doctrine of forfeiture. However, *State v. Henderson*, *supra*, rejected the argument that assaulting a child who is so young that defendant knows the child will be incapable of testifying should trigger forfeiture. Defendant's actions did not result in the child's unavailability.

The hearing to determine unavailability and reliability must be more than a simple statement by counsel. See *In re M.O.*, 13 Kan. App. 2d 381, 383, 770 P.2d 856 (1989).

The 60-460(dd) hearsay exception can also be applied to hearings for the severance of parental rights. See *In re D.V.*, 17 Kan. App. 2d 788, 790, 844 P.2d 752 (1993).

51.130

PRESUMPTION OF INNOCENCE

The Committee recommends that there be no separate instruction given defining presumption of innocence.

Notes on Use

For authority, see K.S.A. 21-5108. PIK 4th 51.010, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to presumption of innocence.

Comment

Before July 1, 2011 Revisions to Criminal Code

Failure to give a detailed instruction was approved in *State v. Taylor*, 212 Kan. 780, 784, 512 P.2d 449 (1973).

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51.140

REASONABLE DOUBT

The Committee recommends that there be no separate instruction given defining reasonable doubt.

Notes on Use

For authority, see K.S.A. 21-5108. PIK 4th 51.010, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to reasonable doubt. See Notes on Use therein.

Comment

Before July 1, 2011 Revisions to Criminal Code

The Committee believes that the words "reasonable doubt" are so clear in their meaning that no explanation is necessary.

The Kansas Supreme Court approved this principle in *State v. Bridges*, 29 Kan. 138, 141 (1882), by stating: "It has often been said by courts of the highest standing that perhaps no definition or explanation can make any clearer what is meant by the phrase 'reasonable doubt' than that which is imparted by the words themselves."

State v. Davis, 48 Kan. 1, 10, 28 Pac. 1092 (1892), states: "It is to be presumed that the jury understood what the words 'reasonable doubt' meant. The idea intended to be expressed by these words can scarcely be expressed so truly or so clearly by any other words in the English language."

The Committee's recommendation that no separate instruction on reasonable doubt be given was approved in *State v. Mack*, 228 Kan. 83, 88, 612 P.2d 158 (1980); *State v. Dunn*, 249 Kan. 488, Syl. ¶ 4, 820 P.2d 412 (1991); *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994); *State v. Lumbrera*, 257 Kan. 144, 891 P.2d 1096 (1995); and *State v. Banks*, 260 Kan. 918, 927 P.2d 456 (1996).

In *State v. Wilson*, 281 Kan. 277, Syl. ¶ 4, 130 P.3d 48 (2006), the court said the term "reasonable doubt" does not require jury instruction or definition.

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51.150

INFORMATION—INDICTMENT

The Committee recommends that there be no separate instruction given.

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51.160

DEFENDANT AS A WITNESS

The Committee recommends that there be no separate instruction given as to the defendant as a witness.

Comment

If the defendant testifies, his or her testimony, like that of any other witness, should be considered as set forth in PIK 4th 51.060, Credibility of Witnesses.

See PIK 4th 51.080, Defendant's Failure to Testify.

See PIK 4th 51.060, Credibility of Witnesses, Notes on Use.

The Supreme Court has noted "the trend to eliminate instructions which focus on the credibility of certain testimony" and the belief of this Committee that such instructions are not justified. *State v. Willis*, 240 Kan. 580, 587, 731 P.2d 287 (1987). See also *State v. DeVries*, 13 Kan. App. 2d 609, 618, 780 P.2d 1118 (1989); *State v. Land*, 14 Kan. App. 2d 515, 518, 794 P.2d 668 (1990).

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51.170**EXPERT WITNESS**

Certain testimony has been given in this case by experts. Experts are persons who, from experience, education or training have specialized knowledge on matters not common to people in general. The law permits experts to give their opinions about such matters. The testimony of experts is to be considered like any other testimony and is to be evaluated by the same tests. You should consider it in connection with all the other facts and circumstances. You should give it the weight and credit you determine are appropriate.

Notes on Use

This instruction is identical to PIK Civil 4th 102.50. If this instruction is given, it should follow PIK Criminal 4th 51.060, Credibility of Witnesses.

Comment

Because opinion testimony from an expert witness is admitted only when the "jurors' common knowledge and experience would not permit them to properly understand the circumstances of the case," *State v. Kahler*, 307 Kan. 374, 399, 410 P.3d 105 (2018), held that the general PIK instruction on credibility of witnesses, which instructs the jury to use common knowledge and experience in assessing testimony, is insufficient to direct the jury's assessment of the credibility of expert opinion testimony.

In *State v. Lumbrera*, 257 Kan. 144, 891 P.2d 1096 (1995), the court found no error in the trial court's refusal to give an expert witness instruction.

In *State v. Adams*, 292 Kan. 151, 165-166, 254 P.3d 515 (2011), the court acknowledged a trend away from instructions that focus on the credibility of categories of witnesses but held that it was not error to add the instruction on expert witnesses from PIK Civil (now PIK Civil 4th 102.50) to the general instruction on witness credibility in PIK Crim. 3d 52.09 (now PIK Crim. 4th 51.170). Doing so discouraged jurors from being overly impressed by the expertise and official positions of prosecution experts who were not opposed by a defense expert.

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51.180

NUMBER OF WITNESSES

The Committee recommends that there be no separate instruction given as to the number of witnesses.

Comment

An instruction as to number of witnesses calls attention to a fact you are telling the jury not to consider.

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51.190

ALIBI

The Committee recommends that there be no separate instruction given as to alibi.

Notes on Use

For authority relating to notice provisions for the introduction of alibi evidence, see K.S.A. 22-3218.

Comment

The Committee's recommendation was approved in *State v. Skinner*, 210 Kan. 354, 359, 503 P.2d 168 (1972); *State v. Murray*, 210 Kan. 748, 749, 504 P.2d 247 (1972); and *State v. Holloman*, 17 Kan. App. 2d 279, 837 P.2d 826 (1992).

In *State v. Peters*, 232 Kan. 519, 656 P.2d 768 (1983), the Court held that it was not reversible error to give an alibi instruction. It stated, however, that one should not be given.

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51.200

CIRCUMSTANTIAL EVIDENCE

The Committee recommends that there be no separate instruction given as to circumstantial evidence.

Comment

In *State v. Wilkins*, 215 Kan. 145, 156, 523 P.2d 728 (1974), the Supreme Court held that an instruction on circumstantial evidence is unnecessary when a proper instruction on "reasonable doubt" is given. The Court went on to overrule all previous decisions which required such an instruction.

To give this type of instruction, however, was held to not constitute reversible error in *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

In *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981), the Supreme Court affirmed defendant's conviction although he requested this type instruction and the request was refused. The opinion notes the recommendation of the Committee. See also *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).

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51.210

CONFESSION

The Committee recommends that there be no separate instruction given as to confession.

Comment

State v. Stephenson, 217 Kan. 169, 535 P.2d 940 (1975); *State v. Hardwick*, 220 Kan. 572, 552 P.2d 987 (1976), held that it was not necessary to give an instruction relating to a confession. The Committee's recommendation was noted with apparent approval in *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981), and with specific approval in *State v. Mason*, 238 Kan. 129, 133, 708 P.2d 963 (1985).

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51.220

IMPEACHMENT

The Committee recommends that there be no separate instruction given as to impeachment.

Comment

The Committee believes that the standard instruction in PIK 4th 51.060, Credibility of Witnesses, provides adequate jury guides.

See PIK-Civil 4th 102.30, Impeachment.

The Committee's recommendation was noted with apparent approval in *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994).

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52.010

CULPABLE MENTAL STATE

The State must prove that the defendant (committed the crime) (insert defendant's act that is the element of the crime which requires a particular culpable mental state) insert one of the following:

- intentionally.
- or
- knowingly.
- or
- recklessly.

[A defendant acts intentionally when it is the defendant's desire or conscious objective to insert one or more of the following as appropriate for the crime charged:

- do the act complained about by the State.
- or
- cause the result complained about by the State.]

[A defendant acts knowingly when the defendant is aware insert one or more of the following as appropriate for the crime charged:

- of the nature of (his) (her) conduct that the State complains about.
- or
- of the circumstances in which (he) (she) was acting.
- or
- that (his) (her) conduct was reasonably certain to cause the result complained about by the State.]

[A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk that insert one or more of the following as appropriate for the crime charged:

- certain circumstances exist.
- or
- a result of the defendant's actions will follow.

This act by the defendant disregarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation.]

Notes on Use

For authority, see K.S.A. 21-5202(a). According to this section, a culpable mental state ordinarily is an essential element of every crime in the criminal code. The definitions are found in subsections (h), (i), and (j) of that statute. The trial judge should instruct on the appropriate mental state and use the bracketed definition as required by each charge.

When the definition of a crime specifies a culpable mental state without distinguishing among the material elements of the crime, the culpable mental state applies to each element, unless a contrary purpose plainly appears. K.S.A. 21-5202(f). When the definition specifies a culpable mental state only for a particular element or elements, a culpable mental state is not required for other elements, K.S.A. 21-5202(g). In such cases, the second parenthetical option in the first paragraph should be used.

The Committee believes this instruction must be given in every case unless:

1. the definition of the crime charged plainly dispenses with a culpable mental state; or
2. a culpable mental state is otherwise excluded under K.S.A. 21-5203.

K.S.A. 21-5202(d) points out that even if the definition of a crime does not prescribe a culpable mental state, one is nevertheless required unless the definition plainly dispenses with any mental element. In turn, subsection (e) provides that when a culpable mental state must be inserted as required by subsection (d), use of the terms "intent", "knowledge", or "recklessness" suffices. For such a charge, PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State, should be given along with all three bracketed paragraphs from this instruction.

Because K.S.A. 21-5302, which defines the crime of conspiracy, neither prescribes a required culpable mental state nor plainly dispenses with a culpable mental state, proof of the required culpable mental state ordinarily would be satisfied under K.S.A. 21-5202(e) by proof that defendant acted intentionally, knowingly, or recklessly. But proof of a conspiracy requires proof of an agreement to commit another crime, and when a culpable mental state is specified for the other crime, the culpable mental state necessary to establish conspiracy liability is the same as is necessary to establish the underlying substantive offense. *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018).

Comment

In *State v. McLinn*, 307 Kan. 307, 409 P.3d 1 (2018), the court held that K.S.A. 21-5202 identifies only three culpable mental states, intentional, knowing and reckless. Premeditation is not a separate culpable mental state. Thus, it was proper to instruct the jury that defendant was not criminally responsible if, because of mental disease or defect, defendant "lacked the intent to kill [the victim]" and it would have been improper to add to an instruction based on PIK-Criminal 4th 52.120 the language "or the ability to premeditate the killing."

The statute defining the crime of unlawful possession of a firearm after conviction of a felony neither specifies a culpable mental state nor plainly dispenses with a mental element. Because the statute does not clearly state that it is defining an absolute-liability crime, a culpable mental state is required by K.S.A. 21-5202(d). *State v. Howard*, 51 Kan. App. 2d 28, 339 P.3d 809 (2014), *aff'd* 305 Kan. 984, 389 P.3d 1280 (2017) ("Because we cannot improve upon the panel's thorough and well-reasoned analysis, we adopt it here.") The default culpable mental state in K.S.A. 21-5202(a) and (e) requires the State to prove only that defendant intentionally, knowingly, or recklessly "engaged in the conduct that constitutes the crime." This is a general intent standard. K.S.A. 21-5202(f) specifies that the culpable mental state for a crime applies to all elements of the crime if the definition of the crime prescribes a culpable mental state without distinguishing among the material elements of the crime. However, this provision applies only when the statute prescribes a culpable mental state. Thus, in *Howard*, the State was required only to prove that defendant intentionally, knowingly, or recklessly engaged in the prohibited conduct of possessing the firearm and was not required to prove that defendant knew that the disposition of a prior criminal proceeding in Missouri was considered under the Kansas unlawful possession statute to be a felony conviction.

In *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018), defendant was charged with conspiracy, for which K.S.A. 21-5302 does not specify a required mental state. The conspiracy charged was to commit the crime of aggravated robbery, a crime for which the culpable mental state required by statute is that defendant acted "knowingly." Reading K.S.A. 21-5302 *in pari materia* with K.S.A. 21-5202(e), the court held it was legally appropriate for the trial court, in addition to giving the jury instructions on conspiracy from PIK-Criminal 4th 53.030, 53.040, and 53.060, to instruct the jury, "The State must prove that the defendant committed the crime of Conspiracy to Commit Aggravated Robbery, knowingly." The court rejected defendant's argument that "knowingly" should have been replaced with "intentionally." Older caselaw describing conspiracy as a specific intent crime is not controlling after the 2011 revision of the criminal code.

K.S.A. 21-5202(i) specifies that when the mental culpability requirement for a crime is "knowingly," it is a general intent crime. The required mental state for the crime of aggravated assault of a law enforcement officer, when committed with a deadly weapon, is only that defendant "knowingly placed [the officer] in reasonable apprehension of immediate bodily harm." In *State v. Kershaw*, 302 Kan. 772, 359 P.3d 52 (2015), the court reaffirmed prior law that voluntary intoxication is not a defense to a general intent crime. Instructing the jury that voluntary intoxication was not a defense to such a charge of aggravated assault on a law enforcement officer was proper and did not relieve the prosecution of its burden to prove defendant acted knowingly.

Harmonizing K.S.A. 21-5202(f), (g), and (i) "to the greatest extent possible," *State v. Hobbs*, 301 Kan. 203, 340 P.3d 1179 (2015), concluded that "the legislature does not intend for 'general intent' to necessarily mean what it once did" in every context. Defendant in *Hobbs* was charged under K.S.A. 21-5413(b)(1)(A) with aggravated battery for "knowingly causing great bodily harm to another person or disfigurement of another person." Applying K.S.A. 21-5202(i) to this offense, "knowingly" requires that the defendant have acted when defendant was aware that some type of great bodily harm or disfigurement of another person was reasonably certain to result. "This does not mean that the accused must have foreseen the specific harm that resulted. Instead, it is sufficient that he or she acted while knowing that any great bodily harm or disfigurement of the victim was reasonably certain to result from the action."

In *State v. Seba*, 305 Kan. 185, 380 P.3d 209 (2016), the trial court in a prosecution for first degree murder instructed the jury that it must find defendant "intentionally killed" the victim and used the first form of PIK 4th 52.010: "A defendant acts intentionally when it is the Defendant's

desire or conscious objective to do the act complained of by the State." Because the act complained of was that defendant "killed" the victim and defendant could not intend to kill without intending to cause death, the instruction would not confuse a jury that it could convict merely because defendant intended to fire the gun. The court observed, "Perhaps the district court could have reworded the elements language to grammatically fit the 'cause the result' PIK language."

52.020

**PROOF OF A HIGHER CULPABLE MENTAL
STATE PROVES THE LESSER**

[If the State has proved that the defendant acted intentionally, then the State has proved as well that the defendant acted knowingly.]

[If the State has proved that the defendant acted intentionally or knowingly, then the State has proved as well that the defendant acted recklessly.]

Notes on Use

For authority, see K.S.A. 21-5202(c). This instruction should be given if the State has proved a higher culpable mental state than that required by a particular offense. This instruction informs the jury of the relative degrees of the culpable mental states contemplated in the criminal code. When there are multiple charges, and one requires proof that defendant acted knowingly and another requires proof that defendant acted recklessly, both alternatives should be given.

Comment

The felony crime of stalking under K.S.A. 21-5427(a)(3) requires proof that defendant, after having been served with a protective order, "recklessly" engaged in an act that violated the order. There is a presumption under K.S.A. 21-5427(c) that an individual who violates a protective order, after having been served with the order, acts knowingly. In *State v. Chavez*, 310 Kan. 421, 447 P.3d 364 (2019), defendant argued that the presumption of knowing conduct under K.S.A. 21-5427(c) negates the reckless element required in K.S.A. 21-5427(a)(3) because it is factually impossible to act recklessly when one acts knowingly. The court held that adoption of K.S.A. 21-5202(c), as part of the recodification of the Kansas criminal code, made it "*legally possible* to be guilty of a reckless act by knowingly or intentionally committing the same act." Thus, the presumption under K.S.A. 21-5427(c) is not internally inconsistent with the recklessness element of stalking under K.S.A. 21-5427(a)(3).

Although proof that defendant acted intentionally or knowingly suffices under K.S.A. 21-5202(c) to establish defendant acted recklessly, that statute cannot be used to create logically impossible criminal offenses. It does not support recognition of attempted unintentional but reckless second-degree murder or attempted reckless involuntary manslaughter as lesser-included offenses of attempted first-degree murder. *State v. Gentry*, 310 Kan. 715, 449 P.3d 429 (2019). Attempt requires an act by a person who intends to commit the crime, and a person cannot attempt to kill another person while not intending to kill the other person.

52.030

**IGNORANCE OF STATUTE OR AGE OF
MINOR IS NOT A DEFENSE**

It is not a defense that the defendant did not know insert one of the following:

- **of the existence, constitutionality, or scope of, or the meaning of the terms used in, the statute under which the defendant is prosecuted.**
- **the age of a minor, even though age is a material element of the crime with which the defendant is charged.**

Notes on Use

For authority, see K.S.A. 21-5204.

52.040

INTOXICATION—INVOLUNTARY

Intoxication involuntarily produced is a defense if it renders the defendant substantially incapable of knowing or understanding the wrongfulness of (his) (her) conduct and of conforming (his) (her) conduct to the requirements of law.

Notes on Use

For authority, see K.S.A. 21-5205(a). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

Comment

Before July 1, 2011 Revisions to Criminal Code

Before a defendant's intoxication may be said to be involuntary, the defendant must show something more than a strong urge or compulsion to drink. *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973).

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52.050

VOLUNTARY INTOXICATION—GENERAL INTENT CRIME

Voluntary intoxication is not a defense to a charge of insert crime.

[However, when the defendant acted only to aid another in committing the crime, voluntary intoxication may be considered in determining whether the defendant was capable of forming the required intent to aid the commission of insert crime.]

Notes on Use

For authority, see K.S.A. 21-5205(b). The second paragraph should be included if there is an issue of fact as to whether a defendant may have acted only as an aider. PIK 4th 52.140, Responsibility for Crimes of Another—Intended and Not Intended, should also be given in such circumstances.

The classification as a "general intent" crime in K.S.A. 21-5202(i) of a crime in which the mental culpability requirement is expressed as "knowingly," "known," or "with knowledge" is not controlling on the question under K.S.A. 21-5205(b) whether "a particular intent or other state of mind is a necessary element to constitute a particular crime." An instruction on voluntary intoxication is appropriate "when a defining mental state is a stand-alone element separate and distinct from the actus reus of the crime," including when that mental state is expressed as "knows." *State v. Murrin*, 309 Kan. 385, Syl. ¶ 1, 435 P.3d 1126 (2019).

Comment

In *State v. Murrin*, 309 Kan. 385, Syl. ¶ 1, 435 P.3d 1126 (2019), the court held that a voluntary intoxication instruction was required for a charge of criminal trespass under K.S.A. 21-5808(a)(1)(A) for "entering or remaining upon . . . any . . . [l]and . . . by a person who knows such person is not authorized or privileged to do so . . ." Although the statute does not prescribe a mental state for the actus reus of "entering or remaining," K.S.A. 21-5205(b) applies because the statute prescribes as a necessary element the stand-alone element that the defendant "knows" the defendant is not authorized or privileged to enter or remain. "This is a classic specific intent crime because it requires a mental state separate and apart from whatever mental state is required for the actus reus. The Legislature's use of 'knows' differs from its use of 'knowingly' as a marker of general intent" in K.S.A. 21-5202(i). The court cites examples of crimes in which "knowingly" is used to describe the actus reus, for which an instruction on voluntary intoxication would not be appropriate, including arson under K.S.A. 21-5812(a)(1)(A) and domestic battery under K.S.A. 21-5414(a)(2).

In *Murrin, supra*, the court noted that, under its test, an instruction on voluntary intoxication would not be appropriate on a charge of interference with law enforcement, if the court focused only on the elements of K.S.A. 21-5904(a)(3) defining the crime. The requirement of "knowingly obstructing, resisting, or opposing" a law enforcement officer applies only to the actus reus and no stand-alone particular intent or other state of mind is prescribed as a necessary element. However, because the trial court relied on case precedent to add a required stand-alone element that defendant "knew or should have known" the person was a law enforcement officer, the voluntary intoxication instruction was required.

The required mental state for the crime of aggravated assault of a law enforcement officer, when committed with a deadly weapon, is that defendant "knowingly placed [the officer] in reasonable apprehension of immediate bodily harm." *State v. Kershaw*, 302 Kan 772, 359 P.3d 52 (2015), held that instructing the jury that voluntary intoxication was not a defense to this category of aggravated assault on a law enforcement officer was proper and did not relieve the prosecution of its burden to prove defendant acted knowingly. Under *State v. Murrin, supra*, the *Kershaw* holding would be explained on the basis that "knowingly" is used only to describe the actus reus, not a stand-alone mental state.

In *State v. Seba*, 305 Kan. 185, 380 P.3d 209 (2016), the jury was instructed that voluntary intoxication could be a defense to charges of first-degree premeditated murder, second-degree intentional murder, attempted premeditated murder, and attempted intentional murder. The Supreme Court held it was proper to instruct the jury that voluntary intoxication was not a defense to the lesser included offense of voluntary manslaughter. The required mental state is "knowingly" killing, which makes this offense a general intent crime. Further, even if the district court should have instructed that voluntary intoxication could be a defense to the further lesser included offense of attempted voluntary manslaughter, any error did not affect the outcome because the jury found premeditation.

Before July 1, 2011 Revisions to Criminal Code

Mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense, is no excuse for the offense, or a defense to the charge. Unless evidence is presented that shows intoxication to the extent a defendant's ability to form the requisite intent was impaired, no voluntary intoxication instruction is required. *State v. Minski*, 252 Kan. 806, 850 P.2d 809 (1993).

However, "where evidence of intoxication tends to show that the defendant was incapable of forming the particular intent to injure which is a necessary ingredient of the crime of aggravated battery he is entitled to an instruction on the lesser included offense of ordinary battery." *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973).

Evidence that defendant was so impaired that defendant lost the ability to reason, plan, recall, or exercise motor skills as a result of voluntary intoxication can compel a jury instruction. *State v. Reed*, 302 Kan. 390, 352 P.3d 1043 (2015) (mere evidence of consumption is insufficient to require instruction; fact defendant told detective he could not recall where he went immediately after offense was insufficient when defendant described what happened at that location).

The fact of intoxication as affecting intent or state of mind is a jury question. *State v. Miles*, 213 Kan. 245, 246, 515 P.2d 742 (1973).

Where no particular intent or state of mind is a necessary element of the crime (e.g., assault with a deadly weapon), no instruction on voluntary intoxication is required. *State v. Farris*, 218 Kan. 136, 143, 542 P.2d 725 (1975).

"An instruction on the effect of voluntary intoxication and an instruction on the defense of insanity may both be given when there has been evidence of intoxication which bears upon the issue of a required specific intent and when the defense of insanity is relied on by the defendant." *State v. James*, 223 Kan. 107, 574 P.2d 181 (1977).

"To be guilty of aiding and abetting in the commission of a crime the defendant must wilfully and knowingly associate himself with the unlawful venture and wilfully participate in it as he would in something he wishes to bring about or to make succeed." *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).

Where evidence indicates defendant could only be found guilty as an aider or abettor, specific intent is an issue, and voluntary intoxication may indicate absence of required intent or state of mind and be a defense. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980). See also, *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984).

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, 883 P.2d 1144 (1994).

52.060

**VOLUNTARY INTOXICATION—CRIME
REQUIRING PARTICULAR INTENT**

Evidence of voluntary intoxication may be considered in determining whether such intoxication impaired the defendant's mental faculties to the extent that (he) (she) was incapable of forming the necessary intent to insert particular intent element of the crime .

Notes on Use

For authority, see K.S.A. 21-5205(b).

The classification as a "general intent" crime in K.S.A. 21-5202(i) of a crime in which the mental culpability requirement is expressed as "knowingly," "known," or "with knowledge" is not controlling on the question under K.S.A. 21-5205(b) whether "a particular intent or other state of mind is a necessary element to constitute a particular crime." An instruction on voluntary intoxication is appropriate "when a defining mental state is a stand-alone element separate and distinct from the actus reus of the crime," including when that mental state is expressed as "knows." *State v. Murrin*, 309 Kan. 385, Syl. ¶ 1, 435 P.3d 1126 (2019).

Comment

In *State v. Murrin*, 309 Kan. 385, Syl. ¶ 1, 435 P.3d 1126 (2019), the court held that a voluntary intoxication instruction was required for a charge of criminal trespass under K.S.A. 21-5808(a)(1)(A) for "entering or remaining upon . . . any . . . [l]and . . . by a person who knows such person is not authorized or privileged to do so . . ." Although the statute does not prescribe a mental state for the actus reus of "entering or remaining," K.S.A. 21-5205(b) applies because the statute prescribes as a necessary element the stand-alone element that the defendant "knows" the defendant is not authorized or privileged to enter or remain. "This is a classic specific intent crime because it requires a mental state separate and apart from whatever mental state is required for the actus reus. The Legislature's use of 'knows' differs from its use of 'knowingly' as a marker of general intent" in K.S.A. 21-5202(i). The court cites examples of crimes in which "knowingly" is used to describe the actus reus, for which an instruction on voluntary intoxication would not be appropriate, including arson under K.S.A. 21-5812(a)(1)(A) and domestic battery under K.S.A. 21-5414(a)(2).

In *Murrin, supra*, the court noted that, under its test, an instruction on voluntary intoxication would not be appropriate on a charge of interference with law enforcement if the court focused only on the elements of K.S.A. 21-5904(a)(3) defining the crime. The requirement of "knowingly obstructing, resisting, or opposing" a law enforcement officer applies only to the actus reus and no stand-alone particular intent or other state of mind is prescribed as a necessary element.

However, because the trial court relied on case precedent to add a required stand-alone element that defendant "knew or should have known" the person was a law enforcement officer, the voluntary intoxication instruction was required.

Before July 1, 2011 Revisions to Criminal Code

"Where the crime charged requires a specific intent, voluntary intoxication may be a defense and an instruction thereon is required where there is evidence to support that defense." *State v. Sterling*, 235 Kan. 526, Syl. ¶ 2, 680 P.2d 301 (1984). See also *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987); *State v. Gadelkarim*, 247 Kan. 505, 508, 802 P.2d 507 (1990).

"The distinction between a general intent crime and a crime of specific intent is whether, in addition to the intent required by K.S.A. 21-3201, the statute defining the crime in question identifies or requires a further particular intent which must accompany the prohibited acts." *State v. Bruce*, 255 Kan. 388, 394, 874 P.2d 1165 (1994).

"When the defense of voluntary intoxication is asserted in a criminal trial, the issue concerning the level of the defendant's intoxication is a question of fact for the jury." *State v. Falke*, 237 Kan. 668, Syl. ¶ 10, 703 P.2d 1362 (1985).

"A defendant in a criminal case may rely upon evidence of voluntary intoxication to show a lack of specific intent even though he also relies upon other defenses inconsistent therewith." *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987). "To require the giving of an instruction on voluntary intoxication there must be some evidence of intoxication upon which a jury might find that a defendant's mental faculties were impaired to the extent that he was incapable of forming the necessary specific intent required to commit the crime." *Id.*

Voluntary intoxication may be a defense to aggravated indecent liberties when it negates the specific intent to arouse or satisfy sexual desires. However, *State v. Kessler*, 276 Kan. 202, 73 P.3d 761 (2003), found no error in the failure to instruct on voluntary intoxication in a prosecution for aggravated indecent liberties, even though the State offered evidence that defendant was a heavy drinker who once had urinated on his son while defendant was sleeping and lost control of his bladder. Defendant did not testify and put forth no evidence to suggest he was intoxicated at the time of the alleged acts or that his mental faculties were impaired on the nights in question.

Evidence of intoxication of defendant 5-6 hours after the defendant's last contact with victim did not warrant an instruction on voluntary intoxication. *State v. Smith*, 254 Kan. 144, 864 P.2d 709 (1993).

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, 883 P.2d 1144 (1994).

Where the defendant is charged with murder in the first degree, or murder in the second degree committed intentionally, voluntary intoxication may be a defense where such intoxication impaired the defendant's mental faculties to the extent that he was incapable of premeditation or forming the necessary intent to kill. In such a case there must be proof that the defendant was intoxicated to such an extent that he was not conscious of what he was doing or that he was not aware of what he was doing. *State v. Cravatt*, 267 Kan. 314, 979 P.2d 679 (1999).

See also *State v. Hernandez*, 292 Kan. 598, 257 P.3d 767 (2011) (instruction properly refused despite testimony that defendant was "high" or "intoxicated" when witnesses testified defendant knew what was going on and what he was doing and defendant provided detailed recollection of events on night of offense); *State v. Kidd*, 293 Kan. 591, 265 P.3d 1165 (2011) (while there was evidence defendant had been drinking and was "buzzed," evidence insufficient to permit finding defendant was so intoxicated that he was unable to form specific intent).

Even when it is appropriate to give this instruction in a prosecution for premeditated first-degree murder or intentional second-degree murder, evidence of voluntary intoxication *alone* will not justify an instruction on unintentional but reckless second-degree murder as a lesser included offense. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004); *State v. Cavaness*, 278 Kan. 469, 101 P.3d 717 (2004); *State v. Jones*, 283 Kan. 186, 207-210, 151 P.3d 22 (2007).

In *State v. Kleypas*, 272 Kan. 894, 943-7, 40 P.3d 139 (2001), the Supreme Court considered and rejected the defendant's contentions that the trial court's voluntary intoxication instruction based upon PIK 54.12-A changed voluntary intoxication into an affirmative defense and prohibited the jury from aggregating intoxication with other evidence of mental disorder which also affected the defendant's capacity to form the necessary intent.

In *State v. Bradford*, 272 Kan. 523, 535, 34 P.3d 434 (2001), the voluntary intoxication defense was applicable to both intent and state of mind elements of multiple charges, including capital murder, first degree murder, felony murder and aggravated burglary. The trial court altered the final two lines of the instruction so that it read: "was incapable of forming the necessary [premeditation or intent to kill...or intent to commit the underlying felonies]."

Bradford rejected defendant's claim that this instruction is inconsistent with K.S.A. 21-3208, noting that the legislature has not chosen to modify the Court's interpretation of the statute. The Court also found no error in the trial court's failure to modify this instruction to make voluntary intoxication one factor out of several for the jury to consider when determining if he was capable of the requisite intent or state of mind. There was no evidence in the record that defendant was of low intelligence or that any other aspect of his character or background affected his ability to form the requisite intent.

52.070

VOLUNTARY INTOXICATION— CRIME REQUIRING PARTICULAR STATE OF MIND

Evidence of voluntary intoxication may be considered in determining whether such intoxication impaired the defendant's mental faculties to the extent that (he) (she) was incapable of (forming) (having) the necessary insert particular state of mind element of crime.

Notes on Use

For authority, see K.S.A. 21-5205(b).

The classification as a "general intent" crime in K.S.A. 21-5202(i) of a crime in which the mental culpability requirement is expressed as "knowingly," "known," or "with knowledge" is not controlling on the question under K.S.A. 21-5205(b) whether "a particular intent or other state of mind is a necessary element to constitute a particular crime." An instruction on voluntary intoxication is appropriate "when a defining mental state is a stand-alone element separate and distinct from the actus reus of the crime," including when that mental state is expressed as "knows." *State v. Murrin*, 309 Kan. 385, Syl. ¶ 1, 435 P.3d 1126 (2019).

Comment

In *State v. Murrin*, 309 Kan. 385, Syl. ¶ 1, 435 P.3d 1126 (2019), the court held that a voluntary intoxication instruction was required for a charge of criminal trespass under K.S.A. 21-5808(a)(1)(A) for "entering or remaining upon . . . any . . . [l]and . . . by a person who knows such person is not authorized or privileged to do so . . ." Although the statute does not prescribe a mental state for the actus reus of "entering or remaining," K.S.A. 21-5205(b) applies because the statute prescribes as a necessary element the stand-alone element that the defendant "knows" the defendant is not authorized or privileged to enter or remain. "This is a classic specific intent crime because it requires a mental state separate and apart from whatever mental state is required for the actus reus. The Legislature's use of 'knows' differs from its use of 'knowingly' as a marker of general intent" in K.S.A. 21-5202(i). The court cites examples of crimes in which "knowingly" is used to describe the actus reus, for which an instruction on voluntary intoxication would not be appropriate, including arson under K.S.A. 21-5812(a)(1)(A) and domestic battery under K.S.A. 21-5414(a)(2).

In *Murrin, supra*, the court noted that, under its test, an instruction on voluntary intoxication would not be appropriate on a charge of interference with law enforcement if the court focused only on the elements of K.S.A. 21-5904(a)(3) defining the crime. The requirement of "knowingly obstructing, resisting, or opposing" a law enforcement officer applies only to the actus reus and no stand-alone particular intent or other state of mind is prescribed as a necessary element.

However, because the trial court relied on case precedent to add a required stand-alone element that defendant "knew or should have known" the person was a law enforcement officer, the voluntary intoxication instruction was required.

In *State v. Claerhout*, 310 Kan. 924, 453 P.3d 855 (2019), the court held that an instruction on the defense of voluntary intoxication was not factually appropriate when defendant was charged with unintentional but reckless homicide, committed while driving at high speed with a .211 blood alcohol content. It is "counterintuitive" to claim an individual can be so drunk that the individual is incapable of engaging in reckless conduct.

Before July 1, 2011 Revisions to Criminal Code

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, 883 P.2d 1144 (1994).

In *State v. Bradford*, 272 Kan. 523, 535, 34 P.3d 434 (2001), the voluntary intoxication defense was applicable to both intent and state of mind elements of multiple charges, including capital murder, first degree murder, felony murder and aggravated burglary. The trial court altered the final two lines of the instruction so that it read: "was incapable of forming the necessary [premeditation or intent to kill...or intent to commit the underlying felonies]."

Bradford rejected defendant's claim that this instruction is inconsistent with K.S.A. 21-3208, noting that the legislature has not chosen to modify the Court's interpretation of the statute. The Court also found no error in the trial court's failure to modify this instruction to make voluntary intoxication one factor out of several for the jury to consider when determining if he was capable of the requisite intent or state of mind. There was no evidence in the record that defendant was of low intelligence or that any other aspect of his character or background affected his ability to form the requisite intent.

52.080

COMPULSION OR THREAT DEFENSE

Compulsion is a defense if the defendant acted under the compulsion or threat of imminent infliction of death or great bodily harm, and (he) (she) reasonably believed that death or great bodily harm would be inflicted upon (him) (her) or upon (his) (her) [(parent) (spouse) (child) (brother) (sister)] if (he) (she) did not act as (he) (she) did.

[This defense is not available to one who intentionally or recklessly placed (himself) (herself) in a situation in which (he) (she) would be subjected to compulsion or threat.]

Notes on Use

For authority, see K.S.A. 21-5206. If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

This instruction is not to be used in cases of murder or voluntary manslaughter. K.S.A. 21-5206.

The second paragraph should be used only when there is some evidence indicating that the defendant intentionally or recklessly placed himself or herself in the situation indicated.

Comment

Although compulsion may be a defense to felony murder when compulsion is a defense to the underlying felony, the defense is available only when coercion was continuous and defendant had no reasonable opportunity to escape the scene without committing the charged crime. *State v. Dupree*, 304 Kan. 378, 373 P.3d 811 (2016). Even when defendant's testimony on direct examination "represents some slight evidence of duress," the trial court properly may refuse to give an instruction on compulsion when no rational jury could find the elements of the defense. In *Dupree*, defendant's testimony on cross-examination and other evidence negated the defense.

Before July 1, 2011 Revisions to Criminal Code

State v. Anderson, 287 Kan. 325, 334, 197 P.3d 409 (2008), disapproved contrary decisions and clarified that defendant is entitled to an instruction on a theory of defense, including compulsion, only when there is evidence that, "viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with defendant's theory." Defendant's own testimony may alone be sufficient evidence of the defense.

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17, Use of Force in Defense of a Person, in the use of "immediate" in lieu of the statutory "imminent". The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate." *State v. Irons*, 250 Kan. 302, 309, 827 P.2d 722 (1992), applied the reasoning of *Hundley* to the defense of compulsion.

In *State v. Crawford*, 253 Kan. 629, 861 P.2d 791 (1993), the Supreme Court held that the district court did not err by adding the following language to the instruction: "A threat of future injury is not enough, particularly after danger from the threat has passed."

In *State v. Hunter*, 241 Kan. 629, 642, 740 P.2d 559 (1987), the Court considered the statutory prohibition on use of the compulsion defense to charges of murder and manslaughter. The Court held that compulsion may be used as a defense to felony murder when compulsion is a defense to the underlying felony.

A person charged with escape from lawful custody may not claim the defense of compulsion unless the following conditions exist: (1) The prisoner is faced with a threat of imminent infliction of death or great bodily harm; (2) there is no time for complaint to the authorities or there exists a history of futile complaints which makes any result from such complaints illusory; (3) there is not time or opportunity to resort to the courts; (4) there is no evidence of force or violence used toward prison personnel or other "innocent" persons in the escape; and (5) the prisoner immediately reports to the proper authorities when he or she has attained a position of safety from the imminent threat. *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992). *State v. Harvey*, 41 Kan. App. 2d 104, 202 P.3d 21 (2009), concluded that an instruction based upon the *Irons* case should be denied only when the evidence, viewed in the light most favorable to defendant, "could not provide a substantial basis of fact to reasonably conclude all five required elements were satisfied."

The defense of compulsion is applicable to absolute liability traffic offenses. *State v. Riedl*, 15 Kan. App. 2d 326, 329, 807 P.2d 697 (1991).

The second paragraph of this instruction makes clear that "a person who connects himself or herself with criminal activities or is otherwise indifferent to known risks cannot use compulsion as a defense." *State v. Littlejohn*, 298 Kan. 632, 316 P.2d 136 (2014), citing *State v. Scott*, 250 Kan. 350, 827 P.2d 733 (1992).

The defense of compulsion requires coercion or duress to be present, imminent, impending, and continuous. It may not be invoked when the defendant had a reasonable opportunity to escape or avoid the criminal act without undue exposure to death or serious bodily harm. *State v. Matson*, 260 Kan. 366, 385, 921 P.2d 790 (1996); *State v. Jackson*, 280 Kan. 16, 118 P.3d 1238 (2005); *State v. Baker*, 287 Kan. 345, 197 P.3d 421 (2008) (because defendant was away from threatening party for ten minutes, no compulsion instruction was required; no rational factfinder could conclude that reason for defendant's failure to escape from compulsion was because of lack of reasonable opportunity to do so).

52.090

IGNORANCE OR MISTAKE OF FACT OR LAW

It is a defense in this case if by reason of ignorance or mistake of (fact) (law) the defendant did not have at the time the mental state which the statute requires as an element of the crime.

[The defendant may be convicted of a lesser offense if the facts were as (he) (she) believed them to be and the other evidence in the case establishes the lesser offense.]

Notes on Use

For authority, see K.S.A. 21-5207(a) and (c). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

The bracketed paragraph should be given only in cases where a lesser offense is included in the greater offense committed.

As provided by the authorizing statute (K.S.A. 21-5207), this instruction should not be given in a case in which requirement of proof of a culpable mental state is excluded. See K.S.A. 21-5204 and PIK 4th 52.030, Ignorance of Statute or Age of Minor Is Not a Defense.

Likewise, this instruction does not apply to and should not be given in circumstances involving statutes providing for guilt without a culpable mental state.

Comment

The defense of mistake of law is not limited to the circumstances described in K.S.A. 21-5207(b). See PIK 4th 52.100, Ignorance or Mistake of Law—Reasonable Belief. Mistake of law is a defense under K.S.A. 21-5207(a) when it negates the mental state required as an element of the offense. *State v. Howard*, 51 Kan. App. 2d 28, 339 P.3d 809 (2014), *aff'd* 305 Kan. 984, 389 P.3d 1280 (2017) ("Because we cannot improve upon the panel's thorough and well-reasoned analysis, we adopt it here."). *Howard* held that defendant, charged with unlawful possession of a firearm after conviction of a felony, was not entitled to assert mistake of law as a defense based on his correct understanding that Missouri did not regard his case as having resulted in a conviction and that he lawfully purchased the firearm in Missouri. Kansas law, not Missouri law, determines whether the Missouri proceeding resulted in a felony conviction for the purpose of the Kansas offense of unlawful possession of a firearm. The culpable mental state in Kansas for unlawful possession is the general intent to possess the firearm. The State does not have to prove defendant knew about Kansas law regarding his status as a felon. Thus, defendant's claimed mistake of law did not negate the culpable mental state required.

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52.100

IGNORANCE OR MISTAKE OF LAW—REASONABLE BELIEF

It is a defense to the charge made against the defendant if the defendant reasonably believed that (his) (her) conduct did not constitute a crime and insert one of the following:

- **the crime was defined by an administrative regulation or order which was not known to the defendant and had not been published, as provided by law, and the defendant could not have acquired such knowledge by the exercise of ordinary care.**
or
- **the defendant acted in reliance upon a statute which later was determined to be invalid.**
or
- **the defendant acted in reliance upon an order or opinion (of the Supreme Court of Kansas) (a United States appellate court) later overruled or reversed.**
or
- **the defendant acted in reliance upon an official interpretation of the (statute) (regulation) (order) defining the crime made by a (public officer) (agency) legally authorized to interpret the statute.**

Notes on Use

For authority, see K.S.A. 21-5207(b). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

Whether there has been a publication of the administrative regulations, a determination of the invalidity of statute, an overruling of court decisions or official interpretations by officer or agency legally authorized, are all matters of judicial notice and the existence of which can and should be determined and instructed on as a matter of law. The defendant's act in reliance thereon and the other provisions are questions of fact to be determined by the jury.

Comment

Before July 1, 2011 Revisions to Criminal Code

This defense is not applicable when reliance is based on decisions of the various district, county or other lower courts of the State. The term "public officer" in subparagraph (d) of K.S.A. 21-3203(2) does not include judges and magistrates. *State v. V.F.W. Post No. 3722*, 215 Kan. 693, 527 P.2d 1020 (1974).

52.110

ENTRAPMENT

Entrapment is a defense if the defendant was (induced) (persuaded) by a (public officer) (public officer's agent) to commit a crime which the defendant had no previous (disposition) (intention) (plan) (purpose) to commit. Entrapment is not a defense if defendant (originated) (began) (conceived) the plan to commit the crime or when (he) (she) had shown (a predisposition) (a plan) (an intention) (a purpose) for committing the crime and was merely afforded (an) (the) opportunity to (consummate) (carry out [his] [her] intention to complete) (complete [his] [her] plan to commit) the crime and was assisted by the public (officer) (agent).

[The defendant cannot rely on the defense of entrapment if the conduct of insert conduct was likely to occur in the course of defendant's (usual activities) (business) and the (public officer) (public officer's agent) did not mislead the defendant into believing (his) (her) conduct was lawful.]

Notes on Use

For authority, see K.S.A. 21-5208. If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

The bracketed paragraph should be used when the crime alleged occurred in the course of defendant's business, such as selling intoxicating liquors, or other usual activity, such as selling narcotics.

For a definition of public officer, see K.S.A. 21-5111(aa).

Comment

Before July 1, 2011 Revisions to Criminal Code

In discussing when the defense of entrapment is available, the Supreme Court in *State v. Jordan*, 220 Kan. 110, 112, 551 P.2d 773 (1976), stated: "The defense of entrapment arises when a law enforcement officer, or someone acting in his behalf, generates in the mind of a person who is innocent of any criminal purpose the original intent or idea to commit a crime which he had not contemplated and would not have committed but for the inducement of the law officer." *State v. Hamrick*, 206 Kan. 543, 479 P.2d 854 (1971). A defendant can rely on the defense of entrapment when he is induced to commit a crime which he had no previous intention of committing, but he cannot rely on the defense or obtain an instruction on entrapment when the evidence establishes

he had a previous intention of committing the crime and was merely afforded an opportunity by a law officer to complete it. *State v. Wheat*, 205 Kan. 439, 469 P.2d 338 (1970). The trial court correctly refused to substitute the word "solicited" for "induced or persuaded" in an instruction based on 54.14. *State v. Carr*, 23 Kan. App. 2d 384, 931 P.2d 34 (1997).

For other cases discussing the availability of the defense of entrapment, see *State v. Amodei*, 222 Kan. 140, 145, 563 P.2d 440 (1977); *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974); *State v. Smith*, 229 Kan. 533, 625 P.2d 1139 (1981); *State v. Nelson*, 249 Kan. 689, 697, 822 P.2d 53 (1991).

See *United States v. Russell*, 411 U.S. 423, 36 L.Ed. 2d 366, 93 S.Ct. 1637 (1973).

In *State v. Farmer*, 212 Kan. 163, 510 P.2d 180 (1973), it was held: "The defense of entrapment is generally not available to a defendant who denies that he has committed the offense charged." See K.S.A. 21-3210.

See also *State v. Rogers*, 234 Kan. 629, 675 P.2d 71 (1984).

52.120

MENTAL DISEASE OR DEFECT

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. This evidence is to be considered only in determining whether the defendant had the culpable mental state required to commit the crime. The defendant is not criminally responsible for (his) (her) acts if because of mental disease or defect the defendant lacked the set out the particular culpable mental state which is an element of the crime or crimes charged.

Notes on Use

For authority, see K.S.A. 21-5209. In 1996, the term "insanity" was replaced by "mental disease or defect."

This instruction should be given when the defense of mental disease or defect is asserted and evidence has been introduced in support of the claim.

See K.S.A. 22-3219 for the requirement that defendant serve notice of intent to assert the defense of mental disease or defect.

Comment

In *State v. McLinn*, 307 Kan. 307, 409 P.3d 1 (2018), the court held that K.S.A. 21-5202 identifies only three culpable mental states, intentional, knowing and reckless. Premeditation is not a separate culpable mental state. Thus, it was proper to instruct the jury that defendant was not criminally responsible if, because of mental disease or defect, defendant "lacked the intent to kill [the victim]" and it would have been improper to add to an instruction based on PIK-Criminal 4th 52.120 the language "or the ability to premeditate the killing."

Before July 1, 2011 Revisions to Criminal Code

State v. Hunter, 41 Kan. App. 2d 507, 203 P.3d 23 (2009), noted that PIK 3d 54.10 and 54.10-A "properly instructed the jury" on defendant's defense of mental disease or defect.

In *State v. Hedges*, 269 Kan. 895, 901, 8 P.3d 1259 (2000), and *State v. Jorrick*, 269 Kan. 72, 83, 4 P.3d 610 (2000), the court makes it clear that both the traditional "insanity" defense and the "diminished mental capacity" defense have been replaced by the "mental disease or defect" defense codified at K.S.A. 22-3220.

52.130

MENTAL DISEASE OR DEFECT—COMMITMENT

If you find the defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required culpable mental state, then the defendant is committed to the State Security Hospital for safe-keeping and treatment until discharged according to law.

Notes on Use

For authority, see K.S.A. 22-3428.

This instruction must be given in any case where there is reliance on the defense of mental disease or defect.

Comment

Before July 1, 2011 Revisions to Criminal Code

State v. Hunter, 41 Kan. App. 2d 507, 203 P.3d 23 (2009), noted that PIK 3d 54.10 and 54.10-A "properly instructed the jury" on defendant's defense of mental disease or defect.

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52.140

RESPONSIBILITY FOR CRIMES OF ANOTHER—INTENDED AND NOT INTENDED

A person is criminally responsible for a crime committed by another if the person, either before or during its commission, and with the mental culpability required to commit the crime insert one of the following:

- **intentionally aids the other person to commit the crime.**
- or**
- **(advises) (hires) (counsels) (procures) the other person to commit the crime.**

[The person who is responsible for a crime committed by another is also responsible for any other crime committed in carrying out or attempting to carry out the intended crime, if the person could reasonably foresee the other crime as a probable consequence of committing or attempting to commit the intended crime.]

[All participants in a crime are equally responsible without regard to the extent of their participation. However, mere association with another person who actually commits the crime or mere presence in the vicinity of the crime is insufficient to make a person criminally responsible for the crime.]

Notes on Use

For authority, see K.S.A. 21-5210(a), and 21-5210(b) for the first bracketed paragraph. This instruction combines former PIK 3d 54.05, Responsibility for Crimes of Another, and PIK 3d 54.06, Responsibility for Crimes of Another—Crime Not Intended.

To be convicted of a specific-intent crime on an aiding and abetting theory, defendant must have the same specific intent to commit the crime as the principal. *State v. Overstreet*, 288 Kan. 1, 200 P.3d 427 (2009). Thus, the first bracketed paragraph should not be used for a specific-intent crime for which defendant is charged on an aiding and abetting theory. When defendant is charged with both a specific-intent and general-intent crime, the trial court must instruct the jury that it can use the foreseeability instruction in the first bracketed paragraph only when considering whether defendant is guilty of the general-intent crime. *State v. Calhoun*, 56 Kan. App. 2d 185, 426 P.3d 519 (2018) (*petition for review pending on other grounds*).

In *State v. Llamas*, 298 Kan. 246, 311 P.3d 399 (2013), the court described as the "better practice" inclusion of the language in the second sentence of the second bracketed paragraph when the defense is based on the theory that defendant was merely present and did not actively

aid the crime. The court encouraged trial judges to use this language and in *State v. Hilt*, 299 Kan. 176, 185-186, 322 P.3d 367 (2014), warned that "failure to do so may imperil convictions in future similar cases." However, inclusion of the additional language is not required when the evidence establishes defendant was an active participant rather than "one who innocently found himself in the wrong place with the wrong person at the wrong time." *State v. Carter*, 305 Kan. 139, 165, 380 P.3d 189 (2016); *State v. Barlett*, 308 Kan. 78, 418 P.3d 1253 (2018).

Comment

When PIK 4th 52.140 was given, it was not legally necessary for the district court *sua sponte* to add the definition of "intentional conduct" to the instruction. Doing so would have been redundant. *State v. Potts*, 304 Kan. 687, 374 P.3d 639 (2016) (applying "clearly erroneous" standard of review).

An aider or abettor cannot be guilty of a crime if the primary actor did not have the requisite mental state of the crime. *State v. Gentry*, 310 Kan. 715, 449 P.3d 429 (2019). In *Gentry*, defendant was charged with first-degree murder for aiding another who shot toward a truck and killed a passenger in the truck. The court held defendant was not entitled to an instruction on voluntary manslaughter as a lesser included offense. Even if the evidence would have supported a finding that defendant was acting in the heat of passion when the victim was shot, there was no evidence that the shooter was acting in the heat of passion.

Before July 1, 2011 Revisions to Criminal Code

When this instruction is given and the prosecution's theory is that defendant is guilty as an aider and abettor, it is not error for the court to modify the elements instruction to indicate that defendant "or another for whose conduct he is criminally responsible" committed the act charged, when the modification clarifies to the jury that defendant is not charged as a principal actor. *State v. Burton*, 35 Kan. App. 2d 876, 136 P.3d 945 (2006). The trial court is not required to modify the elements in this way. *Id.*

PIK 54.05 was specifically approved in *State v. Minor*, 229 Kan. 86, 89, 622 P.2d 998 (1981), and *State v. Manard*, 267 Kan. 20, 978 P.2d 253 (1999).

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner*, 193 Kan. 189, 196, 392 P.2d 863 (1964); *State v. Jackson*, 201 Kan. 795, 799, 443 P.2d 279 (1968). *State v. Payton*, 229 Kan. 106, 622 P.2d 651 (1981). The other crime must be reasonably foreseeable. *State v. Davis*, 4 Kan. App. 2d 210, 604 P.2d 68 (1979). See Comment to PIK 3d 54.05, Responsibility for Crimes of Another.

One who watches at a distance to prevent surprise while others commit a crime is deemed in law to be a principal and punishable as such. *State v. Neil*, 203 Kan. 473, 474, 454 P.2d 136 (1969).

It is not required that a person, to be an aider and abettor, be physically present when the crime is committed. Likewise, there is no such requirement for a charge of felony murder based upon the defendant aiding and abetting the commission of the underlying felony. *State v. Gleason*, 277 Kan. 628, 88 P.3d 218, 227-8 (2004) (victim's death does not have to be foreseeable result of burglary or other inherently dangerous felony for defendant to be convicted of felony murder; thus, aiding and abetting instruction not required to include foreseeability requirement). See also *State v. Tague*, 296 Kan. 993, 1010, 298 P.3d 273 (2013).

Mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. *State v. Green*, 237 Kan. 146, 697 P.2d 1305 (1985). Many cases held that the trial court's refusal to include this language as an additional instruction was not error, since PIK 3d 54.05 clearly informed the jury that intentional acts by a defendant are necessary to sustain a conviction for aiding and abetting. *State v. Hunter*, 241 Kan. 629, 639, 740 P.2d 559 (1987); *State v. Scott*, 250 Kan. 350, 361, 827 P.2d 733 (1992); *State v. Ninci*, 262 Kan. 21, 46, 936 P.2d 1364 (1997); *State v. Jackson*, 270 Kan. 755, 19 P.3d 121 (2001); *State v. Pink*, 270 Kan. 728, 20 P.3d 31 (2001). However, *State v. Llamas*, 298 Kan. 246, 311 P.3d 399 (2013), discussed in the Notes on Use, described inclusion of the language as the "better practice" in certain cases.

See *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974), wherein it was held "to be guilty of aiding and abetting in the commission of a crime the defendant must willfully and knowingly associate himself with the unlawful venture and willfully participate in it as he would in something he wishes to bring about or to make succeed." In *State v. Wakefield*, 267 Kan. 116, 121, 977 P.2d 941 (1999), the court states that the trier of facts may consider the failure of a person to oppose the commission of a crime in connection with other circumstances as evidence of aiding and abetting. The Committee concluded that this language from *Wakefield* properly could be refused as an additional instruction because PIK 3d 54.05 was adequate. However, the court held that inclusion of this language along with the PIK instruction did not improperly permit the jury to find defendant guilty of several crimes by aiding or abetting in the commission of only one of them. *State v. Bradford*, 272 Kan. 523, 538, 34 P.3d 434 (2001).

State v. Jackson, 280 Kan. 16, 118 P.3d 1238 (2005), held the trial court did not err when it gave PIK 54.05 and substituted the following language for PIK 54.06:

"In addition, a person is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended.

"All participants in a crime are equally guilty without regard to the extent of their participation. However, mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider or abettor. To be guilty of aiding and abetting in the commission of a crime the defendant must wilfully and knowingly associate himself with the unlawful venture and wilfully participate in it as he would in something he wishes to bring about or make succeed."

The instruction was warranted by unique facts in the case and, because withdrawal was not available as a defense, did not improperly preclude the jury from considering defendant's claim of dissociation from other participants.

Failure to specifically instruct the jury that it must find the elements of aiding and abetting beyond a reasonable doubt was not clearly erroneous where the jury was instructed that the reasonable doubt standard applied to all claims made by the state. *State v. Nash*, 261 Kan. 340, 932 P.2d 442 (1997).

In *State v. Edwards*, 250 Kan. 320, 331, 826 P.2d 1355 (1992), the Supreme Court examined the elements of aiding and abetting and solicitation and determined that, under the facts of that case, those offenses did not merge and were not multiplicitous.

Where evidence indicates defendant could only be found guilty as an aider or abettor, specific intent is an issue, and voluntary intoxication may indicate absence of the required intent or state of mind and be a defense. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980). See also *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984).

Where the evidence permits the jury to find defendant guilty either as an active principal in commission of the crime or as an aider and abettor, it is not error to give this instruction. *State v. Gleason*, 277 Kan. 624, 88 P.3d 218, 227 (2004); *State v. Percival*, 32 Kan. App. 2d 82, 95, 79 P.3d 211 (2003) (while prosecution offered evidence defendant participated in robbery, jury could have found from defendant's evidence that defendant drove companion to site, waited in car and assisted in getaway).

Regardless of whether the State included an aiding and abetting theory in the charging document, an instruction on aiding and abetting is appropriate if, from the totality of the evidence, the jury could reasonably conclude that the defendant aided and abetted another in the commission of the crime. *State v. Pennington*, 254 Kan. 757, 869 P.2d 624 (1994). See also *State v. Francis*, 282 Kan. 120, 145 P.3d 48 (2006) (instruction appropriate despite prosecutor's opening statement that evidence would show defendant fired fatal shots when evidence at trial failed to establish which shots were fatal ones); *State v. Holt*, 285 Kan. 760, 175 P.3d 239 (2008) (while prosecution's theory was that defendant was shooter, defendant's evidence was that third person was shooter and jury could find defendant aided third person).

When a charge of felony murder is based upon the defendant aiding and abetting the commission of an underlying felony that is inherently dangerous to human life, PIK 3d 54.05 is the appropriate instruction on aiding and abetting and PIK 3d 54.06 is not necessary because the foreseeability requirement is established as a matter of law. *State v. Gleason*, 277 Kan. 624, 88 P.3d 218, 228-230 (2004). *Gleason* repudiates language in recent cases that death must be foreseeable from the commission of the underlying inherently dangerous felony to support conviction of felony murder.

To convict a defendant of a specific-intent crime on an aiding and abetting theory, defendant must be shown to have the same specific intent to commit the crime as the principal. *State v. Overstreet*, 288 Kan. 1, 13, 200 P.3d 427 (2009); *State v. Gleason*, 299 Kan. 1127, 329 P.3d 1102 (2014), *rev'd and remanded on other grounds sub nom. Kansas v. Carr*, 577 U.S. ___, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016) (to prove aiding and abetting premeditated murder, prosecution must show defendant shared principal actor's premeditated intent to murder victim). *Overstreet* held it was error to give PIK 54.06 in addition to PIK 54.05 in a prosecution for attempted premeditated first-degree murder. Under K.S.A. 21-3205(1), upon which PIK 54.05 is based, a person to be guilty of aiding and abetting a premeditated first-degree murder must be found, beyond a reasonable doubt, to have had the requisite premeditation to murder the victim. The jury improperly could have understood PIK 54.06 to permit it to convict, without a finding that defendant possessed the specific intent of premeditation, if it found defendant aided or abetted an aggravated assault and that premeditated murder was a reasonably foreseeable consequence of aggravated assault. See also *State v. Engelhardt*, 280 Kan. 113, 119 P.3d 1148 (2005) (improper to use PIK 3d 54.06 in prosecution for premeditated murder). In *Engelhardt*, if the person defendant aided intended only to inflict serious bodily harm, *i.e.* aggravated battery, defendant could have been held liable as an aider and abettor of felony murder. However, if an instruction on felony murder had been given, it is well settled that PIK 3d 54.05 rather than 54.06 is the appropriate aiding and abetting instruction. *State v. Gleason*, *supra*.

When this instruction is properly given, the fact that specific intent is required to support conviction as an aider or abettor does not make it improper or confusing also to instruct the jury that specific intent is not required to support conviction as a principal. *State v. Mehling*, 34 Kan. App.2d 122, 115 P.3d 771 (2005) (violations of securities laws).

Failing to stop or report a crime is not a basis for liability under an aider or abettor theory. *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006). However, a parent's awareness of a child's

injuries and failure to do anything to discover their cause or prevent their reoccurrence may be sufficient evidence to warrant an instruction on aiding and abetting abuse of the child. *State v. Smolin*, 221 Kan. 149, 557 P.2d 1241 (1976).

When evidence supported the conclusion that defendant was culpable as an aider and abettor by commanding a companion to "go ahead" and break down an apartment door and to commit simple battery upon the occupant, it was foreseeable that the altercation could escalate to an aggravated battery and thus that the crime of aggravated burglary would be committed as a probable consequence of committing the battery initially intended. *State v. Stout*, 37 Kan. App. 2d 510, 154 P.3d 1176 (2007).

In *State v. Garza*, 259 Kan. 826, 916 P.2d 9 (1996), the court held that a person could be held liable for aiding and abetting a reckless crime. In *Garza*, defendant and another person obtained guns and intentionally shot at each other. A bystander was wounded by one of the other person's bullets. Though defendant and the shooter had cross-purposes in shooting at each other, they acted in concert as to bystanders because the probable consequences were reasonably foreseeable. See also *State v. Friday*, 297 Kan. 1023, 306 P.3d 265 (2013).

K.S.A. 21-3205 does not create an alternative means of committing another crime. It does not create a distinct element of a crime. Rather, it assigns criminal responsibility, making each person who engages in a concerted action to carry out a crime equally culpable. *State v. Bettancourt*, 299 Kan. 131, 322 P.3d 353 (2014).

The State may rely on the theory of aiding and abetting to support one or more of the intentional, premeditated murders necessary to support a capital murder charge for killing multiple victims. *State v. Gleason*, 299 Kan. 1127, 329 P.3d 1102 (2014), *rev'd and remanded on other grounds sub nom. Kansas v. Carr*, 577 U.S. ___, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016) (when there are two victims, K.S.A. 21-3439(a)(6) is not limited to cases in which defendant killed both victims or aided and abetted the killing of both victims by another).

52.150**RESPONSIBILITY FOR CRIME OF ANOTHER
WHO IS NOT PROSECUTED**

It is not a defense that (another) (others) who participated in the commission of the crime (lacked criminal capacity) (has or has not been convicted of the crime, any lesser degree of the crime, or some other crime based on the same act) (has been acquitted).

Notes On Use

For authority, see K.S.A. 21-5210(c). PIK 4th 52.140, Responsibility for Crimes of Another—Intended and Not Intended, should be used when applicable to the particular case. This instruction makes clear that a contrary rule which prevailed at common law is not the law in the State of Kansas.

Comment

Before July 1, 2011 Revisions to Criminal Code

An accessory before the fact may be convicted after the trial and conviction of the principal of a higher degree of offense than the principal was convicted of. *State v. Gray*, 55 Kan. 135, 144, 145, 39 Pac. 1050 (1895).

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52.160

**CORPORATIONS—CRIMINAL RESPONSIBILITY
FOR ACTS OF AGENTS**

A corporation is responsible for acts committed by any person who is authorized to act on behalf of the corporation when acting within the scope of (his) (her) authority.

Notes on Use

For authority, see K.S.A. 21-5211.

Use PIK-Civil 4th 107.06, Scope of Authority, when scope of authority is an issue.

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52.170

INDIVIDUAL RESPONSIBILITY FOR CORPORATION CRIME

An individual who (performs a criminal act) (causes a criminal act to be performed) in the name of or on behalf of a corporation, is responsible to the same extent as if the act was performed in (his) (her) own name or on (his) (her) own behalf.

Notes on Use

For authority, see K.S.A. 21-5212(a).

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52.180

CONDONATION

It is not a defense that the (injured party) (victim) has (excused) (forgiven) (compromised and settled) (ratified) the offense committed.

Notes on Use

Use for this instruction will not ordinarily arise as evidence to support it is generally not admissible. The pretrial conference will normally provide opportunity to settle the question in advance of trial.

Comment

Before July 1, 2011 Revisions to Criminal Code

For authority, see *State v. Newcomer*, 59 Kan. 668, 54 Pac. 685 (1898), a statutory rape case in which the victim married the defendant; *State v. Craig*, 124 Kan. 340, 259 Pac. 802 (1927), in which a mother, owner of an undivided interest, subsequently ratified the act of arson; *State v. Dye*, 148 Kan. 421, 83 P.2d 113 (1938), in which it was held that evidence offered to show a compromise, settlement or ratification will not constitute a bar to conviction and punishment of a crime.

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52.190

RESTITUTION

It is not a defense that the defendant at the time of the trial (has restored) (intends to restore) any property taken or its value to the owner.

Comment

Before July 1, 2011 Revisions to Criminal Code

Kansas case law has principally involved cases of embezzlement. See *State v. Taylor*, 140 Kan. 663, 38 P.2d 680 (1934); *State v. Robinson*, 125 Kan. 365, 263 Pac. 1081 (1928). In the latter case, the Court said: "When one embezzles money or property, the fact that he intends to restore it, or its value, to its owner is not a defense."

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52.200

USE OF FORCE IN DEFENSE OF A PERSON

Defendant claims (his) (her) use of force was permitted as (self-defense) (the defense of another person).

Defendant is permitted to insert one of the choices from below:

- use physical force against another person [—including using a weapon—] [—including through the actions of another—]
- or
- threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]
- or
- display to another person a insert the means of force used

when and to the extent that it appears to (him) (her) and (he) (she) reasonably believes such (physical force) (threat) (display) is necessary to defend (himself) (herself) (someone else) against the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

[Defendant is permitted to use against another person physical force that is likely to cause death or great bodily harm only when and to the extent that it appears to (him) (her) and (he) (she) reasonably believes such force is necessary to prevent death or great bodily harm to (himself) (herself) (someone else) from the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.]

When use of force is permitted as (self-defense) (defense of someone else), there is no requirement to retreat.

[You must presume that a person had a reasonable belief that use of physical force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else) if you find the following:

1. at the time the force likely to cause death or great bodily harm was used, the individual against whom the force was used *insert one of the choices from below:*
 - (was unlawfully or forcefully entering) (had unlawfully or forcefully entered) and was presently within the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]
 - (had removed) (was attempting to remove) a person against that person's will from the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]
2. the person using the force knew or had reason to believe *insert the applicable condition described in paragraph 1* [.]
- [; and 3. if the person against whom force was used was a law enforcement officer who (had entered) (was attempting to enter) the (dwelling) (place of work) (occupied vehicle) in the lawful performance of the officer's duties, the person using the force did not know and should not reasonably have known that the person who (entered) (attempted to enter) was a law enforcement officer.]

This presumption may be overcome if you are persuaded beyond a reasonable doubt that the person did not reasonably believe that use of force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else).

Notes on Use

For authority, see K.S.A. 21-5222, 21-5224, and *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

The third paragraph dealing with deadly force is in brackets because it should be given only when there is evidence that defendant used deadly force. When there is undisputed evidence defendant used deadly force, this paragraph should be used in lieu of the second paragraph.

It may be helpful in some cases to insert the names of defendant and the other persons in place of the terms "defendant," "another person," and "someone else."

K.S.A. 21-5220 requires extensive 2010 amendments to the self-defense statutes to be "applied retroactively." One amendment permits a defendant to assert self-defense when charged with a crime based on a threat to use force when physical force was not used, contrary to the holding in *State v. Hendrix*, 289 Kan. 859, 219 P.3d 40 (2009).

The instruction is not required if the force used by defendant in the claimed self-defense is excessive as a matter of law. *State v. Marks*, 226 Kan. 704, 712-13, 602 P.2d 1344 (1979); *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996).

To qualify for an instruction on self-defense, there must be some evidence presented at trial that the defendant reasonably believed force was necessary to defend himself. *State v. Sims*, 265 Kan. 166, 169, 960 P.2d 1271 (1998).

The presumption described in the final paragraphs of the instruction which are in brackets is based on K.S.A. 21-5224. When given, the instruction on the presumption should be given after PIK 4th 51.050. The instruction should be given only in a case involving the use of deadly force and only if there is evidence sufficient to find that the case is one described in subparagraph (1). Subparagraph (3) should be used only when the person against whom deadly force was used was a law enforcement officer acting in the lawful performance of the officer's lawful duties. In such a case, K.S.A. 21-5224(b)(4) makes the presumption inapplicable if the defendant "knows or reasonably should know" that the person was an officer. When defendant's knowledge is disputed, the jury must resolve that issue to determine whether the presumption arises. K.S.A. 21-5224(b)(1)-(3) specifies three other circumstances in which the presumption does not arise. The Committee believes that ordinarily there will not be a factual issue for the jury to resolve regarding subsections K.S.A. 21-5224(b)(1)-(3) and that the court should decline to give the instruction when there is no dispute that the circumstance exists. In the rare case in which there is a factual dispute whether the circumstance exists, appropriate language should be substituted for subparagraph (3) of the presumption instruction. For example, in a case involving K.S.A. 21-5224(b)(1), subparagraph (3) could read: "the person against whom force was used (did not have a right to be in) (was not a lawful resident of) the (dwelling) (place of work) (occupied vehicle)."

In certain cases defendant may claim the use of force was justified both as self-defense and as the defense of another person. The first paragraph of this instruction may be modified by inserting "and" between "self-defense" and "the defense of another person." However, the second paragraph must be modified by inserting the word "or" between "(himself) (herself)" and "(another)" to make it clear that the jury may find justification as self-defense alone or as the defense of another person alone and need not find both justifications. *State v. Scott*, 271 Kan. 103, 115, 21 P.3d 516 (2001).

Dictum in *State v. Alexander*, 268 Kan. 610, 1 P.3d 875 (2000), stated that the defense of dwelling instruction [now PIK 4th 52.210] should not be used when the defendant is not the occupant of the dwelling in question. *State v. Andrew*, 301 Kan. 36, 340 P.3d 476 (2014), disapproved that dictum and held that instruction was properly given, along with PIK 4th 52.200, when defendant asserted self-defense in using force in the alleged victim's dwelling and there was testimony that the victim used force in defense of his dwelling. The theories of self-defense by defendant and defense of dwelling by the victim are not mutually exclusive, and the defense of dwelling instruction enables the jury to evaluate whether defendant reasonably believed force was necessary to defend against the victim's imminent use of "unlawful" force.

Comment

When defendant invokes K.S.A. 21-5231 to assert immunity from prosecution to avoid trial based on justified use of force, the State bears the burden of production and must establish probable cause that defendant's use of force was not justified. *State v. Ultrares*, 296 Kan. 828, 295 P.3d 1020 (2013) (decided under identical predecessor statute, K.S.A. 21-3219). A defendant may not assert Stand-Your-Ground immunity under K.S.A. 21-5231 after trial opens or a dispositive plea is entered. However, the trial court has power *sua sponte* to grant immunity after the jury returns a guilty verdict but before sentencing is pronounced if the court determines the State failed to establish probable cause that defendant's use of force was not justified. *State v. Barlow*, 303 Kan. 804, 368 P.3d 331 (2016); *State v. Jones*, 298 Kan. 324, 311 P.3d 1125 (2013).

On a motion for immunity, the district court "must consider the totality of the circumstances, weigh the evidence before it without deference to the State, and determine whether the State has carried its burden to establish probable cause that the defendant's use of force was not statutorily justified." *State v. Hardy*, 305 Kan. 1001, Syl. ¶ 1, 390 P.3d 30 (2017). The determination must be based on stipulated fact or evidence, on evidence received at a hearing under the rules of evidence, or both. *Id.* Syl. ¶ 2.

State v. Barlett, 308 Kan. 78, 418 P.3d 1253 (2018), held that the general rule stated in *State v. Bell*, 276 Kan. 785, 80 P.3d 367 (2003), *disapproved on other grounds by State v. Anderson*, 287 Kan. 325, 197 P.3d 409 (2008), and *State v. Kirkpatrick*, 286 Kan. 329, 184 P.3d 247 (2008), *disapproved on other grounds by State v. Sampson*, 297 Kan. 288, 301 P.3d 276 (2013) — that an instruction on self-defense is never available to a defendant charged with a forcible felony — is overly broad. The prohibition in K.S.A. 21-5226(a) on the assertion of self-defense applies only when defendant "is already otherwise committing a forcible felony when he or she commits a separate act of violence, i.e. in purported self-defense." *Barlett*, 308 Kan. 78, Syl. ¶ 1. In *Barlett*, defendant claimed the act that was the basis of the forcible felony charged, criminal discharge of a firearm into an occupied vehicle, was done in self-defense.

In *State v. Barlett*, *supra*, the court held that even though K.S.A. 21-5226(a) did not preclude assertion of self-defense, the defense was not factually appropriate. "A self-defense instruction is not available when the parties are engaging in mutual combat.... It does not matter which party initiated the confrontation when both parties willingly engaged in it." *Barlett*, 308 Kan. 78, Syl. ¶ 2. In *Barlett*, the record established that defendant was the driver of one of three cars whose occupants were "spoiling for a fight." A defendant "may engage in behavior that does not violate a law but that promotes or escalates violent tensions so as to vitiate claims of self-defense."

A defendant may meet defendant's burden to show that a reasonable person in defendant's circumstances would have perceived the use of deadly force as necessary for self-defense, even if the only evidence supporting defendant's theory is defendant's own testimony and the testimony is contradicted by all other witnesses and by physical evidence. Under K.S.A. 21-5108(c), defendant is entitled to an instruction of the affirmative defense if defendant's testimony, if believed, could allow a reasonable jury to conclude defendant was entitled to defend with deadly force. *State v. Qualls*, 309 Kan. 553, 439 P.3d 301 (2019) (testimony, if believed, described scene in which defendant justifiably may have felt threatened with imminent death or great bodily harm); *State v. Haygood*, 308 Kan. 1387, 1405-06, 430 P.3d 11 (2018).

Before July 1, 2011 Revisions to Criminal Code

In *State v. Astorga*, 295 Kan. 339, 284 P.3d 279 (2012), the court held that the trial court properly gave both the self-defense instruction (PIK 3d 54.17, now PIK 4th 52.200) and the forcible felon instruction (PIK 3d 54.20, now PIK 4th 52.230). Defendant's evidence supported a finding that he took a gun to the victim's home only for self-protection and shot the victim only when the victim shot at him first, but the prosecution's evidence supported a finding defendant purchased the gun, took it to the victim's home and shot the victim who was unarmed when the victim responded to an alarm defendant set off.

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17 in the use of "immediate" in lieu of the statutory "imminent." The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate." See also *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986).

There must be an imminently dangerous situation "near at hand" before a defense-of-another instruction should be given. *State v. Hernandez*, 253 Kan. 705, 861 P.2d 814 (1993) (victim's sister was inside place of employment when defendant talked with victim outside); see also *State v. White*, 284 Kan. 333, 161 P.3d 208 (2007).

The existence of the battered woman syndrome in and of itself does not operate as a defense to murder. In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. *State v. Stewart*, 243 Kan. 639, 763 P.2d 572 (1988).

PIK 2d 54.17 properly instructs the jury on both the subjective and objective standards by which to gauge the justification of use of force. *State v. Wiggins*, 248 Kan. 526, 808 P.2d 1383 (1991).

The defense of self-defense requires both a subjective and a reasonable belief that use of force was necessary. In contrast, voluntary manslaughter is an intentional killing upon an unreasonable belief that self-defense is necessary. K.S.A. 21-3403(b); *State v. Holmes*, 278 Kan. 603, 102 P.3d 406 (2004). The voluntary manslaughter analysis is identical to the first, subjective prong required to justify a self-defense instruction. Even though the court gives an instruction on voluntary manslaughter, it may refuse a self-defense instruction if the evidence does not support

a finding of the second, objective prong, that a reasonable person would have perceived the need for the use of force in self-defense. *State v. Gonzalez*, 282 Kan. 73, 106-113, 145 P.3d 18 (2006). *Gonzalez* cited with approval *Tyler v. Nelson*, 163 F.3d 1222 (10th Cir. 1999), which concluded that fulfilling the objective prong requires more than defendant's stated belief and requires evaluation of the evidence in light of the totality of the circumstances.

Because premeditation requires reason and imperfect self-defense requires the absence of reason, it is not error to instruct the jury to consider first-degree premeditated murder before considering imperfect self-defense. *State v. Lawrence*, 281 Kan. 1081, 135 P.3d 1211 (2006).

State v. Friday, 297 Kan. 1023, 306 P.3d 265 (2013), held that the trial court properly refused to give an instruction on self-defense when the evidence clearly revealed that defendant and the victim engaged in mutual combat and that defendant failed to withdraw in good faith and do everything in her power to avoid killing the victim.

Defendant was not entitled to a self-defense instruction when he testified that he struck the victim once after the victim swung his arm at defendant but that he did not engage in the conduct of others in beating the victim that led to the charges of felony murder and aggravated kidnapping. For a self-defense instruction to be appropriate, defendant would have to acknowledge that he engaged in conduct constituting felony murder or aggravated kidnapping and claim that conduct was justified in self-defense. *State v. Waller*, 299 Kan. 707, 328 P.3d 1111 (2014).

Defendant is not entitled to an instruction on self-defense under K.S.A. 21-3211 [now K.S.A. 21-5222] if the evidence establishes that defendant was the first aggressor and there is insufficient evidence to permit the jury to find one of the exceptions in K.S.A. 22-3214 [now K.S.A. 21-5226; see PIK 4th 52.250]. *State v. Salary*, 301 Kan. 586, 343 P.3d 1165 (2015).

52.210

**USE OF FORCE IN DEFENSE OF A DWELLING,
PLACE OF WORK, OR OCCUPIED VEHICLE**

Defendant claims (his) (her) conduct was permitted as a lawful defense of [(his) (her)] (dwelling) (place of work) (occupied vehicle).

Defendant is permitted to insert one of the choices from below:

- use physical force against another person [— including using a weapon—] [—including through the actions of another—]
or
- threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]
or
- display to another person a insert the means of force used

to the extent that it appears to (him) (her) and (he) (she) reasonably believes that such (physical force) (threat) (display) is necessary to prevent the other person from unlawfully (entering into) (remaining in) (damaging) [(his) (her)] (dwelling) (place of work) (occupied vehicle). Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

[Defendant is permitted to use physical force that is likely to cause death or great bodily harm to prevent another person from unlawfully (entering into) (remaining in) (damaging) [(his) (her)] (dwelling) (place of work) (occupied vehicle) only when (he) (she) reasonably believes such force is necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else). Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.]

When use of force is permitted as a lawful defense of [(his) (her)] (dwelling) (place of work) (occupied vehicle), there is no requirement to retreat.

[You must presume that a person had a reasonable belief that use of physical force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else) if you find the following:

1. at the time the force likely to cause death or great bodily harm was used, the individual against whom the force was used insert one of the choices from below:
 - (was unlawfully or forcefully entering) (had unlawfully or forcefully entered) and was presently within the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]
 - (had removed) (was attempting to remove) a person against that person's will from the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]
2. the person using the force knew or had reason to believe insert the applicable condition described in paragraph 1 [.]
-]; and 3. if the person against whom force was used was a law enforcement officer who (had entered) (was attempting to enter) the (dwelling) (place of work) (occupied vehicle) in the lawful performance of the officer's duties, the person using the force did not know and should not reasonably have known that the person who (entered) (attempted to enter) was a law enforcement officer.]

This presumption may be overcome if you are persuaded beyond a reasonable doubt that the person did not reasonably believe that use of force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else).

Notes on Use

For authority, see K.S.A. 21-5223. The applicable parenthetical phrase or phrases should be selected. If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

Dictum in *State v. Alexander*, 268 Kan. 610, 1 P.3d 875 (2000), stated that the defense of dwelling instruction should not be used when the defendant is not the occupant of the dwelling in question. *State v. Andrew*, 301 Kan. 36, 340 P.3d 476 (2014), disapproved that dictum and held this instruction was properly given, along with PIK 4th 52.200, when defendant asserted self-defense in using force in the alleged victim's dwelling and there was testimony that the victim used force in defense of his dwelling. The theories of self-defense by defendant and defense of dwelling by the victim are not mutually exclusive, and the defense of dwelling instruction enables the jury to evaluate whether defendant reasonably believed force was necessary to defend against the victim's imminent use of "unlawful" force.

The third paragraph dealing with deadly force is in brackets because it should be given only when there is evidence that defendant used deadly force. When there is undisputed evidence defendant used deadly force, this paragraph should be used in lieu of the second paragraph.

It may be helpful in some cases to insert the names of defendant and the other persons in place of the terms "defendant," "another person," and "someone else."

K.S.A. 21-5220 requires extensive 2010 amendments to the self-defense statutes to be "applied retroactively." One amendment permits a defendant to assert self-defense when charged with a crime based on a threat to use force when physical force was not used, contrary to the holding in *State v. Hendrix*, 289 Kan. 859, 219 P.3d 40 (2009).

The presumption described in the final paragraphs of the instruction which are in brackets is based on K.S.A. 21-5224. When given, the instruction on the presumption should be given after PIK 4th 51.050, Affirmative Defenses—Burden of Proof. The instruction should be given only in a case involving the use of deadly force and only if there is evidence sufficient to find that the case is one described in subparagraph (1). Subparagraph (3) should be used only when the person against whom deadly force was used was a law enforcement officer acting in the lawful performance of the officer's lawful duties. In such a case, K.S.A. 21-5224(b)(4) makes the presumption inapplicable if the defendant "knows or reasonably should know" that the person was an officer. When defendant's knowledge is disputed, the jury must resolve that issue to determine whether the presumption arises. K.S.A. 21-5224(b)(1)-(3) specifies three other circumstances in which the presumption does not arise. The Committee believes that ordinarily there will not be a factual issue for the jury to resolve regarding subsections K.S.A. 21-5224(b)(1)-(3) and that the court should decline to give the instruction when there is no dispute that the circumstance exists. In the rare case in which there is a factual dispute whether the circumstance exists, appropriate language should be substituted for subparagraph (3) of the presumption instruction. For example, in a case involving K.S.A. 21-5224(b)(1), subparagraph (3) could read: "the person against whom force was used (did not have a right to be in) (was not a lawful resident of) the (dwelling) (place of work) (occupied vehicle)."

Comment

State v. Barlett, 308 Kan. 78, 418 P.3d 1253 (2018), held that the general rule stated in *State v. Bell*, 276 Kan. 785, 80 P.3d 367 (2003), *disapproved on other grounds by State v. Anderson*, 287 Kan. 325, 197 P.3d 409 (2008), and *State v. Kirkpatrick*, 286 Kan. 329, 184 P.3d 247 (2008), *disapproved on other grounds by State v. Sampson*, 297 Kan. 288, 301 P.3d 276 (2013) — that an instruction on self-defense is never available to a defendant charged with a forcible felony — is overly broad. The prohibition in K.S.A. 21-5226(a) on the assertion of self-defense applies only when defendant "is already otherwise committing a forcible felony when he or she commits a separate act of violence, i.e. in purported self-defense." *Barlett*, 308 Kan. 78, Syl. ¶ 1. In *Barlett*, defendant claimed the act that was the basis of the forcible felony charged, criminal discharge of a firearm into an occupied vehicle, was done in self-defense.

In *State v. Barlett*, *supra*, the court held that even though K.S.A. 21-5226(a) did not preclude assertion of self-defense, the defense was not factually appropriate. "A self-defense instruction is not available when the parties are engaging in mutual combat.... It does not matter which party initiated the confrontation when both parties willingly engaged in it." *Barlett*, 308 Kan. 78, Syl. ¶ 2. In *Barlett*, the record established that defendant was the driver of one of three cars whose occupants were "spoiling for a fight." A defendant "may engage in behavior that does not violate a law but that promotes or escalates violent tensions so as to vitiate claims of self-defense."

Before July 1, 2011 Revisions to Criminal Code

When defendant invokes K.S.A. 21-3219 (now K.S.A. 21-5231) to assert immunity from prosecution to avoid trial based on justified use of force, the State bears the burden of production and must establish probable cause that defendant's use of force was not justified. *State v. Ultrares*, 296 Kan. 828, 295 P.3d 1020 (2013).

See *State v. Countryman*, 57 Kan. 815, 827, 48 Pac. 137 (1897); *State v. Farley*, 225 Kan. 127, 133-34, 587 P.2d 337 (1978); *State v. Williams*, 295 Kan. 506, 520, 286 P.3d 185 (2012) (defense of dwelling instruction not proper when defendant and victim were headed out front door to fight and defendant was not using force to prevent victim from remaining in house).

52.220

**USE OF FORCE IN DEFENSE OF PROPERTY OTHER THAN
A DWELLING, PLACE OF WORK, OR OCCUPIED VEHICLE**

The defendant claims (his) (her) conduct was permitted as a lawful defense of (his) (her) property.

A person lawfully in possession of property is permitted to insert one of the choices from below:

- use such physical force not likely to cause death or great bodily harm against another person [—including using a weapon—] [—including through the actions of another—]
or
- threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]
or
- display to another person a insert the means of force used

to (prevent) (stop) an unlawful interference with (his) (her) property as would appear necessary to a reasonable person under the circumstances then existing.

Notes on Use

For authority, see K.S.A. 21-5225. If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given. This instruction should not be given when defendant used deadly force. Use of physical force likely to cause death or great bodily harm is permitted only when necessary to prevent imminent death or great bodily harm. See PIK 4th 52.200.

Comment

Before July 1, 2011 Revisions to Criminal Code

When defendant invokes K.S.A. 21-3219 (now K.S.A. 21-5231) to assert immunity from prosecution to avoid trial based on justified use of force, the State bears the burden of production and must establish probable cause that defendant's use of force was not justified. *State v. Ultrares*, 296 Kan. 828, 295 P.3d 1020 (2013).

52.230

FORCIBLE FELON NOT ENTITLED TO USE FORCE

A person is not permitted to (use physical force) (threaten to use physical force) (display a means of force) in defense of (himself) (herself) (someone else) ([his] [her] dwelling) ([his] [her] place of work) ([his] [her] occupied vehicle) ([his] [her] property) if (he) (she) is (attempting to commit) (committing) (escaping after the commission of) insert name of forcible felony.

[For the elements of insert name of felony, see instruction insert instruction number.]

[As used in this instruction, insert name of felony is insert elements from the appropriate pattern instruction.]

Notes on Use

For authority, see K.S.A. 21-5226(a). Insert in the blank space the name of the particular forcible felony applicable to the particular case. For a definition of forcible felony, see K.S.A. 21-5111(n). If defendant also is charged with the forcible felony, use the first sentence in brackets. If defendant is not charged with the forcible felony, use the second sentence in brackets.

Comment

State v. Barlett, 308 Kan. 78, 418 P.3d 1253 (2018), held that the general rule stated in *State v. Bell*, 276 Kan. 785, 80 P.3d 367 (2003), *disapproved on other grounds by State v. Anderson*, 287 Kan. 325, 197 P.3d 409 (2008), and *State v. Kirkpatrick*, 286 Kan. 329, 184 P.3d 247 (2008), *disapproved on other grounds by State v. Sampson*, 297 Kan. 288, 301 P.3d 276 (2013) — that an instruction on self-defense is never available to a defendant charged with a forcible felony — is overly broad. The prohibition in K.S.A. 21-5226(a) on the assertion of self-defense applies only when defendant "is already otherwise committing a forcible felony when he or she commits a separate act of violence, i.e. in purported self-defense." *Barlett*, 308 Kan. 78, Syl. ¶ 1. In *Barlett*, defendant claimed the act that was the basis of the forcible felony charged, criminal discharge of a firearm into an occupied vehicle, was done in self-defense.

In *State v. Barlett*, *supra*, the court held that even though K.S.A. 21-5226(a) did not preclude assertion of self-defense, the defense was not factually appropriate. "A self-defense instruction is not available when the parties are engaging in mutual combat....It does not matter which party initiated the confrontation when both parties willingly engaged in it." *Barlett*, 308 Kan. 78, Syl. ¶ 2. In *Barlett*, the record established that defendant was the driver of one of three cars whose occupants were "spoiling for a fight." A defendant "may engage in behavior that does not violate a law but that promotes or escalates violent tensions so as to vitiate claims of self-defense."

Before July 1, 2011 Revisions to Criminal Code

In *State v. Sullivan & Sullivan*, 224 Kan. 110, 578 P.2d 1108 (1978), the Supreme Court held that, because a jury question remained as to whether the defendants committed the overt act required for an attempted burglary, the trial court erred in instructing the jury that the defendants could not claim self-defense.

In *State v. Astorga*, 295 Kan. 339, 284 P.3d 279 (2012), the court held that the trial court properly gave both the self-defense instruction (PIK 3d 54.17, now PIK 4th 52.200) and the forcible felon instruction (PIK 3d 54.20, now PIK 4th 52.230). Defendant's evidence supported a finding that he took a gun to the victim's home only for self-protection and shot the victim only when the victim shot at him first, but the prosecution's evidence supported a finding defendant purchased the gun, took it to the victim's home and shot the victim who was unarmed when the victim responded to an alarm defendant set off.

Attempted possession of marijuana with intent to sell may be a forcible felony where the circumstances lend themselves to danger and the threat of violence. *State v. Ackward*, 281 Kan. 2, 128 P.3d 382 (2006).

52.240

**PROVOCATION OF FIRST FORCE AS EXCUSE
FOR RETALIATION**

A person is not permitted to provoke an attack on (himself) (herself) (someone else) with the specific intention to use such attack as a justification for inflicting bodily harm upon the person (he) (she) provoked and then claim self-defense as a justification for inflicting bodily harm upon the person (he) (she) provoked.

Notes on Use

For authority, see K.S.A. 21-5226(b). The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 584, 552 P.2d 900 (1976); and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989). This instruction should not be confused with PIK 4th 52.250, Initial Aggressor's Use of Force. This instruction should be used with caution and limitations.

Comment

Before July 1, 2011 Revisions to Criminal Code

One who provokes an attack as an excuse to inflict bodily harm upon another cannot thereafter resist with force even though his own death or serious injury is imminent. *State v. Meyers*, 245 Kan. 471, 781 P.2d 700 (1989).

It is not error to give initial aggressor instructions where the question whether defendant was an aggressor is one of fact for the jury. *State v. Hunt*, 257 Kan. 388, 894 P.2d 178 (1995).

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52.250

INITIAL AGGRESSOR'S USE OF FORCE

A person who initially provokes the use of force against (himself) (herself) (someone else) is not permitted to use force to defend (himself) (herself) (someone else) unless insert one of the following:

- **the person reasonably believes that (he) (she) is in present danger of death or great bodily harm, and (he) (she) has used every reasonable means to escape such danger other than the use of physical force which is likely to cause death or great bodily harm to the other person.**
- or**
- **the person has in good faith withdrawn from physical contact with the other person and indicates clearly to the other person that (he) (she) desires to withdraw and stop the use of force, but the other person continues or resumes the use of force.**

Notes on Use

For authority, see K.S.A. 21-5226(c)(1) and (2).

Comment

Before July 1, 2011 Revisions to Criminal Code

The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976); and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989).

It is not error to give initial aggressor instructions where the question whether defendant was an aggressor is one of fact for the jury. *State v. Hunt*, 257 Kan. 388, 894 P.2d 178 (1995).

Defendant is not entitled to an instruction on self-defense under K.S.A. 21-3211 [now K.S.A. 21-5222; see PIK 4th 52.200] if the evidence establishes that defendant was the first aggressor and there is insufficient evidence to permit the jury to find one of the exceptions in K.S.A. 22-3214 [now K.S.A. 21-5226]. *State v. Salary*, 301 Kan. 586, 343 P.3d 1165 (2015).

52.260

**LAW ENFORCEMENT OFFICER OR PRIVATE PERSON
SUMMONED TO ASSIST—USE OF FORCE IN MAKING ARREST**

The defendant claims (his) (her) conduct was permitted because (he) (she) was a (law enforcement officer) (private person summoned or directed by a law enforcement officer to assist [him] [her]).

A (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist [him] [her]) need not retreat or cease the efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He) (She) is permitted to insert one of the choices from below:

- use physical force against another person [—including using a weapon—] [—including through the actions of another—]
or
- threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]
or
- display to another person a insert the means of force used

which (he) (she) reasonably believes (to be necessary to effect the arrest) (to be necessary to defend [himself] [herself] [someone else] from bodily harm while making the arrest).

However, (he) (she) is permitted to use physical force likely to cause death or great bodily harm only when (he) (she) reasonably believes that such force insert one of the choices from below:

- is necessary to prevent death or great bodily harm to (himself) (herself) (someone else).
or

- **is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit insert name of felony, a felony that involves death or great bodily harm or (is attempting to escape by use of a deadly weapon) (otherwise indicates [he] [she] will endanger human life or inflict great bodily harm unless arrested without delay).]**

[A law enforcement officer making an arrest pursuant to an invalid warrant is permitted to use any force which (he) (she) would be permitted to use if the warrant were valid, unless (he) (she) knows that the warrant is invalid.]

[A private person who is (summoned) (directed) by a law enforcement officer to assist in making an arrest which is unlawful is permitted to use any force which (he) (she) would be permitted to use if the arrest were lawful.]

Reasonable belief requires both a belief on the part of the defendant and the existence of facts that would persuade a reasonable person to that belief.

Notes on Use

For authority, see K.S.A. 21-5227.

The first bracketed paragraph should be used only if there is some evidence that the force was likely to cause death or great bodily harm.

The second bracketed paragraph should be used only where an invalid warrant is involved.

The third bracketed paragraph should be used only where an officer has requested assistance in making an arrest which proves to be unlawful. For authority, see K.S.A. 21-5228(b).

The final paragraph, defining "reasonable belief," appears as necessary here as in PIK 4th 52.200, Use of Force in Defense of a Person, and 52.210, Use of Force in Defense of a Dwelling, Place of Work, or Occupied Vehicle, where it was required to be added to the earlier instructions in *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

52.270

**PRIVATE PERSON'S USE OF FORCE IN MAKING ARREST—
NOT SUMMONED BY LAW ENFORCEMENT OFFICER**

The defendant claims (his) (her) conduct was permitted because (he) (she) was a private person (making) (assisting another private person in making) a lawful arrest.

A private person who (makes) (assists another private person in making) a lawful arrest need not retreat or cease efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He) (She) is permitted to insert one of the choices from below:

- use physical force against another person [—including using a weapon—] [—including through the actions of another—]
or
- threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]
or
- display to another person a insert the means of force used

which (he) (she) reasonably believes to be necessary to insert one of the following:

- effect the arrest.
or
- defend (himself) (herself) (someone else) from bodily harm while making the arrest.

[However, (he) (she) is permitted to use physical force likely to cause death or great bodily harm only when (he) (she) reasonably believes that such force is necessary to prevent death or great bodily harm to (himself) (herself) (someone else).]

Reasonable belief requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

Notes on Use

For authority, see K.S.A. 21-5228(a). See also PIK 4th 52.260, Law Enforcement Officer or Private Person Summoned to Assist—Use of Force in Making Arrest.

The bracketed paragraph should be used only if there is some evidence that the force was likely to cause death or great bodily harm.

The final paragraph, defining "reasonable belief," appears as necessary here as in PIK 4th 52.200, Use of Force in Defense of a Person, and 52.210, Use of Force in Defense of a Dwelling, Place of Work, or Occupied Vehicle, where it was required to be added to the earlier instructions in *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

Comment

Before July 1, 2011 Revisions to Criminal Code

Whether the degree of force employed in making a citizen's arrest is "reasonable" is a jury question. *State v. Johnson*, 6 Kan. App. 2d 750, 752-53, 634 P.2d 1137 (1981), *rev. denied* 230 Kan. 819 (1981).

52.280

USE OF FORCE IN RESISTING ARREST

A person is not authorized to (use physical force) (threaten to use physical force) (display a means of force) to resist an arrest which (he) (she) knows is being made by a (law enforcement officer) (private person summoned and directed by a law enforcement officer to make the arrest) even if the person believes that the arrest is unlawful and the arrest is, in fact, unlawful.

Notes on Use

For authority, see K.S.A. 21-5229.

This instruction should not be given when the defendant claims that the officer used excessive force in making the arrest. *State v. Heiskell*, 8 Kan. App. 2d 667, Syl. ¶ 4, 666 P.2d 207 (1983).

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52.290

INFERENCE OF INTENT

The Committee recommends that no instruction be given because the concept is now incorporated in the definition of intentional conduct in PIK 4th 52.010 and K.S.A. 21-5202(h).

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52.300

**DEFINITION OF CRIME DOES NOT PRESCRIBE
CULPABLE MENTAL STATE**

The State must prove that the defendant insert specific act committed by defendant intentionally, knowingly, or recklessly.

Notes on Use

This instruction should be used only when the charging statute (or one of the alternative ways to commit the crime) is silent concerning the culpable mental state, but a culpable mental state is nevertheless required under the code.

The Kansas criminal code recodification, effective July 1, 2011, introduced the concept of "culpable mental state." According to K.S.A. 21-5202(a), subject to limited exceptions, proof of the culpable mental state of the defendant is an essential element of every crime. The three mental states incorporated into the code are "intentionally," "knowingly," and "recklessly." The code recognizes "intentionally" as the mental state with the highest degree of culpability, followed by "knowingly," and then "recklessly," which represents the lowest degree of culpability. See K.S.A. 21-5202(b).

Challenges arise for anyone instructing a jury when the charge is based on a statute that is silent, in whole or in part, concerning the required culpable mental state. Some statutes plainly dispense with the culpable mental state requirement. For example, see K.S.A. 21-6206(a)(2) (PIK 4th 62.050, Harassment By Telecommunication Device) and K.S.A. 21-6309(a) (PIK 4th 63.080, Unlawful Possession of Firearms on Government Property). But other statutes are totally silent about a culpable mental state, and others have one or more alternatives that express no culpable mental state requirement.

K.S.A. 21-5202(d) provides that "[i]f the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." K.S.A. 21-5202(e) then adds that if a culpable mental state is not prescribed in the definition of a crime, "but one is nevertheless required under subsection (d), 'intent,' 'knowledge' or 'recklessness' suffices to establish criminal responsibility." But see K.S.A. 21-5203, which describes certain crimes of which a person may be guilty without having a culpable mental state.

To comply with the new mental state provisions, the Committee believes the instructing court must ensure that each charging instruction—except one based on a statute under which a culpable mental state is not required pursuant to K.S.A. 21-5202(d) or 21-5203—contain at least one element setting forth a culpable mental state that the State must prove.

When the statutory definition of a crime prescribes a culpable mental state only for a particular element or elements of a crime, K.S.A. 21-5202(g) directs that the prescribed culpable mental state shall be required only for the specified element or elements and not for any other elements. Care should be exercised when drawing such instructions to limit the required mental state only to the element that requires that proof.

Because K.S.A. 21-5302, which defines the crime of conspiracy, neither prescribes a required culpable mental state nor plainly dispenses with a culpable mental state, proof of the required culpable mental state ordinarily would be satisfied under K.S.A. 21-5202(e) by proof that defendant acted intentionally, knowingly, or recklessly. But proof of a conspiracy requires proof of an agreement to commit another crime, and when a culpable mental state is specified for the other crime, the culpable mental state necessary to establish conspiracy liability is the same as is necessary to establish the underlying substantive offense. *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018).

Comment

A culpable mental state "is required unless the definition of an offense plainly dispenses with that requirement or clearly indicates a legislative purpose to impose absolute liability. . . ." *State v. Heironimus*, 51 Kan. App. 2d 841, 356 P.3d 423 (2015). The court held that K.S.A. 8-1602 does not impose absolute liability for the crime of leaving the scene of an injury accident. The prosecution thus "needed to plead and prove" that defendant intentionally, knowingly, or recklessly left the scene in violation of the statute.

The court in *State v. Heironimus*, *supra*, identified as examples of statutes imposing absolute liability and not requiring a culpable mental state K.S.A. 21-6110(a) (smoking in enclosed areas or public meetings), K.S.A. 21-6415(a) (illegal ownership or keeping of an animal), and K.S.A. 21-6417(a)(1) (one form of unlawful conduct of cockfighting).

The statute defining the crime of unlawful possession of a firearm after conviction of a felony neither specifies a culpable mental state nor plainly dispenses with a mental element. Because the statute does not clearly state that it is defining an absolute-liability crime, a culpable mental state is required by K.S.A. 21-5202(d). *State v. Howard*, 51 Kan. App. 2d 28, 339 P.3d 809 (2014), *aff'd* 305 Kan. 984, 389 P.3d 1280 (2017) ("Because we cannot improve upon the panel's thorough and well-reasoned analysis, we adopt it here."). The default culpable mental state in K.S.A. 21-5202(a) and (e) requires the State to prove only that defendant intentionally, knowingly, or recklessly "engaged in the conduct that constitutes the crime." This is a general intent standard. K.S.A. 21-5202(f) specifies that the culpable mental state for a crime applies to all elements of the crime if the definition of the crime prescribes a culpable mental state without distinguishing among the material elements of the crime. However, this provision applies only when the statute prescribes a culpable mental state. Thus, in *Howard*, the State was required only to prove that defendant intentionally, knowingly, or recklessly engaged in the prohibited conduct of possessing the firearm and was not required to prove that defendant knew that the disposition of a prior criminal proceeding in Missouri was considered under the Kansas unlawful possession statute to be a felony conviction.

In *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018), defendant was charged with conspiracy, for which K.S.A. 21-5302 does not specify a required mental state. The conspiracy charged was to commit the crime of aggravated robbery, a crime for which the culpable mental state required by statute is that defendant acted "knowingly." Reading K.S.A. 21-5302 *in pari materia* with K.S.A. 21-5202(e), the court held it was legally appropriate for the trial court, in addition to giving the jury instructions on conspiracy from PIK Criminal 4th 53.030, 53.040, and 53.060, to instruct the jury, "The State must prove that the defendant committed the crime of Conspiracy to Commit Aggravated Robbery, knowingly." The court rejected defendant's argument that "knowingly" should have been replaced with "intentionally." Older caselaw describing conspiracy as a specific intent crime is not controlling after the 2011 revision of the criminal code.

53.010

ATTEMPT

- A. (The defendant is charged with an attempt to commit insert offense. The defendant pleads not guilty.)

OR

- B. (If you do not agree that the defendant is guilty of insert offense, you should then consider the lesser included offense of insert offense.)

To establish this charge, each of the following claims must be proved:

1. The defendant performed an overt act toward the commission of insert offense.
2. The defendant did so with the intent to commit insert offense.
3. The defendant failed to complete commission of insert offense.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

An overt act necessarily must extend beyond mere preparations made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

The elements of the completed crime of insert crime are (set forth in Instruction No. _____) (as follows: _____).

_____).

Notes on Use

For authority, see K.S.A. 21-5301. K.S.A. 21-5301(c) provides that an attempt to commit an off-grid felony (murder in the first degree, treason) is a nondrug severity level 1 crime. An

attempt to commit any other nondrug felony is ranked two crime severity levels below the severity level for the completed crime. The lowest level for an attempt to commit a nondrug felony offense is severity level 10.

K.S.A. 21-5301(d) provides that conviction for an attempt to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months. A violation of K.S.A. 21-36a03, unlawfully manufacturing controlled substances, is exempted from this reduced term of sentence.

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor. K.S.A. 21-5301(e), (f).

An attempt to commit the crime of terrorism is an off-grid, person felony. K.S.A. 21-5421. An attempt to commit any of the following crimes is an off-grid, person felony when the offender is 18 or more years old and the victim is less than 14 years old: aggravated human trafficking, K.S.A. 21-5426; rape, K.S.A. 21-5503; aggravated indecent liberties, K.S.A. 21-5506; aggravated criminal sodomy, K.S.A. 21-5504; commercial sexual exploitation of a child, K.S.A. 21-6422; aggravated internet trading in child pornography, K.S.A. 21-5514; and sexual exploitation of a child, K.S.A. 21-5510. An attempt to commit capital murder is punishable by life in prison with a mandatory minimum 25-year sentence. K.S.A. 21-6620.

If the information charges an attempted crime, omit paragraph B. However, if the attempted crime is submitted as a lesser included offense, omit paragraph A.

If the attempted crime is submitted as a lesser offense, PIK 4th 68.080, Lesser Included Offenses, should be given.

The elements of the applicable substantive crime should be referred to or set forth in the concluding portion of the instruction.

K.S.A. 21-5301(b) provides that legal or factual impossibility is not a defense to a charge of attempt. See also PIK 4th 53.020.

Comment

In *State v. Brown*, 303 Kan. 995, 368 P.3d 1101 (2016), the Supreme Court held that the term "attempt" as found in K.S.A. 21-5402, felony murder, is intended to have a broader application than is found in the crime of attempt set forth in K.S.A. 21-5301.

Before July 1, 2011 Revisions to Criminal Code

An attempt to commit a crime consists of three essential elements: (1) the intent to commit the crime, (2) an overt act toward the perpetration of the crime, and (3) a failure to consummate it. *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995); *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994); *State v. Cory*, 211 Kan. 528, 532, 506 P.2d 1115 (1973); *State v. Gobin*, 216 Kan. 278, 280, 281, 531 P.2d 16 (1975).

Conviction of conspiracy requires an overt act in furtherance of the agreement. In contrast, conviction of attempt requires an overt act beyond mere preparation. See *State v. McAdam*, 277 Kan. 136, 139, 83 P.3d 161 (2004).

An attempted crime requires specific intent as opposed to general intent. The requisite specific intent necessary for attempted murder is not satisfied by trying to prove attempted felony murder. Kansas does not recognize the crime of attempted felony murder. *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994). Since it is logically impossible to specifically intend to commit an unintentional crime, Kansas does not recognize the crime of attempted second-degree murder [unintentional, as defined in K.S.A. 21-3402(b)] or the crime of attempted involuntary manslaughter. *State v. Shannon*, 258 Kan. 425, 905 P.2d 649 (1995); *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996); *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995).

K.S.A. 21-3402 was amended in 1993 to include two alternative definitions of second-degree murder. Under subsection (a) it is defined as the intentional killing of a human being. Under subsection (b) it is defined as a killing committed "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." K.S.A. 1999 Supp. 21-3402. The Supreme Court has held that attempted second-degree murder charged under subsection (b) cannot be recognized as a crime in Kansas, as it would require proof of an intent to commit an unintentional act, a logical impossibility. *State v. Shannon*, 258 Kan. at 429. In *State v. Clark*, 261 Kan. 460, 466-67, 931 P.2d 664 (1997), the Court acknowledged the propriety of an instruction on attempted second-degree murder charged under subsection (a) of K.S.A. 21-3402, though the Court held that the evidence in that particular case did not warrant the instruction.

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. There is no definitive rule concerning what constitutes an overt act; each case depends on the inferences a jury may reasonably draw from the facts. The overt act necessarily must extend beyond mere preparations made by the accused and must approach sufficiently near to consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. *State v. Stevens*, 285 Kan. 307, 318, 172 P.3d 570 (2007); *State v. Zimmerman*, 251 Kan. 54, 833 P.2d 925 (1992); *State v. Chism*, 243 Kan. 484, 759 P.2d 105 (1988); *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985).

In *State v. Kleypas*, 272 Kan. 894, 940-41, 40 P.3d 139 (2001), the Supreme Court recommended that PIK 55.01 be amended to include the term "overt act" rather than "act" and to include language indicating that mere preparation is insufficient to constitute an overt act. The Committee's definitional paragraph also includes language from *State v. Gobin*, 216 Kan. at Syl. 3.

In *State v. Calvin*, 279 Kan. 193, 204, 105 P.3d 710 (2005), the Supreme Court noted that the better practice is to include the definition of "overt act" that is contained in PIK 55.01 whenever the court is instructing on an attempted crime, though in that particular case, the Court refused to reverse, because the defendant had not requested the instructions, and the court found that the jury could not have been misled into believing that mere preparations constituted the overt act.

Holding that attempted rape does not require attempted penetration or even that the defendant be in close proximity to the victim, the Supreme Court upheld the conviction for attempted rape in *State v. Peterman*, 280 Kan. 56, 118 P.3d 1267 (2005). The Court noted that the line between preparation and overt act may be indistinct, and held that each case is dependent on its particular facts and the reasonable inferences the jury may draw from those facts. The Court stated, "Although the overt act does not have to be the last proximate act in the consummation of the crime, it must be either the first or some subsequent step in a direct movement toward the commission of the crime after the preparations are made."

Where the crime charged is completed, there is no basis for an instruction on an attempted crime. *State v. Grauerholz*, 232 Kan. 221, 230, 654 P.2d 395 (1982).

Where there was an overt act by the defendant but failure to complete the crime, a defense of voluntary abandonment was rejected by the Court of Appeals in *State v. Morfitt*, 25 Kan. App. 2d 8, 956 P.2d 719, rev. denied 265 Kan. 888 (1998). The trial court has a duty to instruct on lesser included offenses established by the evidence, even though the instructions have not been requested. Such an instruction must be given even though the evidence is weak and inconclusive and consists solely of the testimony of the defendant. The duty to so instruct exists only where the defendant might reasonably be convicted of the lesser offense. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). K.S.A. 22-3414(3) codifies the duty of the court to instruct on lesser included offenses; however, no party may assign as error the giving or failure to give an instruction, including a lesser included offense instruction, unless the party objects thereto or unless the instruction or failure to give an instruction is clearly erroneous.

For purposes of K.S.A. 21-3107(2), the offenses of attempted second-degree murder and attempted voluntary manslaughter are included crimes of a lesser degree of attempted first-degree murder. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

In order to convict a defendant of an attempt to commit a crime, the State must show the commission of an overt act plus the actual intent to commit that particular crime. See *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985). One cannot intend to commit an accidental, negligent, or reckless homicide. *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994). Following the premise that one cannot intend to commit an unintentional act, Kansas does not recognize an attempt to commit involuntary manslaughter. *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995). For a discussion of whether Kansas recognizes an attempted assault or attempted aggravated assault, see *Spencer v. State*, 264 Kan. 4, 954 P.2d 1088 (1998).

The general principles for determining whether charges are multiplicitous or duplicitous with attempted crimes have been discussed in several cases. In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), a charge of aggravated sexual battery was held not to be multiplicitous with charges of attempted aggravated sodomy or attempted rape. However, aggravated battery has been held to be multiplicitous with a charge of attempted murder. *State v. Perry*, 266 Kan. 224, 968 P.2d 674 (1998); *State v. Cathey*, 241 Kan. 715, 741 P.2d 738 (1987); *State v. Turbeville*, 235 Kan. 993, 686 P.2d 138 (1984); and *State v. Garnes*, 229 Kan. 368, 372, 373, 624 P.2d 448 (1981). In *State v. Cory*, supra, the Court held that possession of burglary tools is separate and distinct from the commission of an overt act in perpetration of a burglary. They are not duplicitous, and separate convictions for both offenses arising from the same conduct are proper. Burglary with the intent to commit rape is not duplicitous with the crime of an attempt to commit rape. *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973).

The crime of aggravated battery was held not to be a lesser included offense of attempted murder in *State v. Gaither*, 283 Kan. 671, 156 P.3d 602 (2007).

Attempted indecent liberties is not a lesser included offense of attempted rape where there is no issue raised by defendant that victim consented to act. *State v. Cahill*, 252 Kan. 309, 845 P.2d 624 (1993).

In *State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006), the Supreme Court found that all tests for multiplicity except the same elements test would no longer be recognized in Kansas. The Court found that the same elements test reflects the legislative intent as set forth in K.S.A. 21-3007, and held, "[T]he test to determine whether charges in a complaint or information under different statutes are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense; if so, the charges stemming from a single act are not multiplicitous. We further hold that this same-elements test will determine whether there is a violation of Sec. 10 of the Kansas Constitution Bill of Rights when a defendant is charged with violations of multiple statutes arising from the same course of conduct."

Attempted crimes under K.S.A. 21-3301 and the crime of conspiracy under K.S.A. 21-3302 when read together do not include a crime of attempted conspiracy. See *State v. Sexton*, 232 Kan. 539, 657 P.2d 43 (1983).

In *State v. Martens*, 273 Kan. 179, 42 P.3d 142, *modified* 274 Kan. 459, 54 P.3d 960 (2002), the Supreme Court reversed a conviction under K.S.A. 65-4159 because the district court seemingly convicted the defendant of both attempted manufacture and actual manufacture of methamphetamine. Although K.S.A. 65-4159 deals with the sentence for both the manufacture and attempted manufacture of methamphetamine, the Court held that convicting the defendant of both is a violation of K.S.A. 21-3107(2). In *State v. Peterson*, 273 Kan. 217, 42 P.3d 137 (2002), the Court held that attempting to manufacture methamphetamine is a lesser included offense of the crime of manufacturing methamphetamine, and held that the failure to give a separate instruction on attempt to manufacture methamphetamine was reversible error.

Attempted voluntary manslaughter is a crime in Kansas. If a defendant has formed the necessary intent to commit the crime of voluntary manslaughter, it is not logically impossible for him or her to attempt but fail after engaging in an overt action toward the accomplishment of an intentional crime. *State v. Gutierrez*, 285 Kan. 332, 344, 172 P.3d 18 (2007).

In *State v. Horn*, 288 Kan. 690, 206 P.3d 526 (2009), the defendant was convicted of an attempt to commit aggravated sodomy in violation of K.S.A. 21-3301(a) and 21-3506(a)(1), a nondrug, severity level 1 felony. The district court, however, sentenced the defendant to the more severe sanctions set forth in K.S.A. 21-4643, Jessica's Law. Under Jessica's Law, attempted aggravated sodomy is subject to a sentence of life with a hard 25. The Supreme Court held that when the legislature allows " . . . the existence of conflicting statutory provisions prescribing different sentences to be imposed for a single criminal offense, the rule of lenity requires that any reasonable doubt as to which sentence applies must be resolved in the defendant's favor." The matter was remanded with directions to sentence the defendant pursuant to the Kansas Sentencing Guidelines Act, which was the lesser sentence.

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53.020**ATTEMPT—IMPOSSIBILITY OF
COMMITTING OFFENSE—NO DEFENSE**

The Committee recommends that there be no separate instruction given.

Notes on Use

K.S.A. 21-5301(b) provides that it shall not be a defense to a charge of attempt that the circumstances under which the act was performed or the means employed or the act itself were such that the commission of the crime was not possible. The Committee believes that PIK 4th 53.010, Attempt, is sufficient without the injection of impossibility of committing the offense into the case.

Comment

Before July 1, 2011 Revisions to Criminal Code

The Supreme Court of Kansas held in *State v. Logan & Cromwell*, 232 Kan. 646, 650, 656 P.2d 777 (1983), that under the provisions of K.S.A. 21-3301(b) neither legal impossibility nor factual impossibility is a defense to an attempted crime. See also *State v. William*, 248 Kan. 389, 807 P.2d 1292 (1991); *State v. DeHerrera*, 251 Kan. 143, 834 P.2d 918 (1992).

In *State v. Jones*, 271 Kan. 201, 21 P.3d 569 (2001), the defendant solicited a partner for a sexual fetish via e-mail, and carried on e-mail correspondence with a person he thought to be a 13-year-old girl. The person with whom he was corresponding was actually an adult male police officer, and an adult female police officer met him at a mall, posing as the teenager. The Supreme Court upheld the defendant's conviction of attempted indecent liberties with a child, relying on K.S.A. 21-3301(b), which establishes that neither factual nor legal impossibility is a defense to a charge of attempt.

In *State v. Peterman*, 280 Kan. 56, 118 P.3d 1267 (2005), the Supreme Court relied upon *Jones* to uphold a defendant's conviction for attempted rape of a child even though the individual whom he had solicited to procure a child for him to have sex with had created a fictional child to describe to defendant. The Court rejected the defendant's argument that he could not have committed attempted rape against a fictional victim, holding that K.S.A. 21-3301(b) "eliminates both factual and legal impossibility as a defense."

For a discussion of factual impossibility, see *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

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53.030

CONSPIRACY

The defendant is charged with conspiracy to commit insert crime.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant agreed with (another person) (others) to (commit) (assist in the commission of) insert crime.
2. The defendant did so agree with the intent that insert crime be committed.
3. The defendant or any party to the agreement acted in furtherance of the agreement by insert description of conduct.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The definition of insert crime, the crime charged to be the subject of the conspiracy, is as (follows: _____)
(set forth in Instruction No. ____).

[It is not a defense that a person with whom defendant conspired lacked actual intent to commit insert underlying crime if the defendant believed the person actually intended to commit the crime.]

Notes on Use

For authority, see K.S.A. 21-5302. K.S.A. 21-5302(d) provides that conspiracy to commit an off-grid felony (murder in the first degree, treason) is a severity level 2 crime. A conspiracy to commit any other nondrug felony offense is ranked two crime severity levels below the severity level for the completed crime. The lowest level for a conspiracy to commit a nondrug felony offense is severity level 10.

Notwithstanding the penalties set forth in K.S.A. 21-5302, conspiracy to commit a violation of K.S.A. 21-6329, the Kansas RICO law, is a severity level 2, person felony. Conspiracy to commit the crime of terrorism, K.S.A. 21-5421, is an off-grid, person felony. Conspiracy to commit any of the following crimes is an off-grid, person felony when the offender is 18 or more years old and the victim is less than 14 years old: aggravated human trafficking, K.S.A. 21-5426; rape, K.S.A. 21-5503; aggravated indecent liberties, K.S.A. 21-5506; aggravated criminal sodomy, K.S.A. 21-5504; commercial sexual exploitation of a child, K.S.A. 21-6422; aggravated internet trading in child pornography, K.S.A. 21-5514; and sexual exploitation of a child, K.S.A. 21-5510.

K.S.A. 21-5302(e) provides that conviction for conspiracy to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months.

A conspiracy to commit a misdemeanor is a class C misdemeanor. K.S.A. 21-5302(f).

This instruction should be given in all crimes of conspiracy along with PIK 4th 53.060, Conspiracy—Defined, and PIK 4th 53.040, Conspiracy—Act in Furtherance Defined. When the evidence warrants its submission, PIK 4th 53.050, Conspiracy—Withdrawal as a Defense, should be given.

The name of the applicable crime should be set forth in Element Nos. 1 and 2 of the instruction. The statutory definition of that crime should be set forth in the concluding portion of the instruction.

The bracketed paragraph regarding intent of co-conspirators should only be used when that issue is present in the trial.

Comment

In *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018), the Supreme Court found that the conspiracy statute has only two elements: (1) an agreement between two or more persons to commit or assist in committing a crime, and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. The court found the plain language of the conspiracy statute does not provide for any alternative means. The court noted that the State's listing of a string of events to satisfy the overt-act element is not a listing of alternative means. The listing was deemed to be merely a sequence of events which collectively make up the alleged overt act. In *State v. Cottrell*, 310 Kan. 150, 445 P.3d 1132 (2019), the court found that a jury instruction listing more than one overt act in furtherance of a conspiracy does not create alternative means.

Before July 1, 2011 Revisions to Criminal Code

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977). Failure of the state to show the existence of an agreement between the defendants resulted in dismissal of conspiracy charges. *State v. Harris*, 266 Kan. 610, 975 P.2d 227 (1999).

In the trial of a conspiracy case, a court may become involved with the conspiracy evidence rule. Under this rule, statements and acts of a co-conspirator said or done outside the presence of the other are admissible in evidence as an exception against the defendant to the hearsay rule. The rule is based on the concept that a party to an agreement to commit a crime is an agent or partner of the other. Therefore the statement of one conspirator is admissible against another conspirator. Because the rule is founded on the existence of an agreement, the prosecution must make a prima facie showing that an agreement exists before the hearsay statement of a co-conspirator may properly be admitted into evidence. *State v. Butler*, 257 Kan. 1043, 897 P.2d 1007 (1995). In *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959), the conspiracy evidence rule is discussed

in depth. Several cases have been decided since *Borserine* and the conspiracy evidence rule has been recognized by statutory enactment. K.S.A. 60-460(i). See *State v. Speed*, 265 Kan. 26, 961 P.2d 13 (1998); *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii. (1978); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21 (1972); *State v. Nirschl*, 208 Kan. 111, 490 P.2d 917 (1971); *State v. Trotter*, 203 Kan. 31, 453 P.2d 93 (1969); *State v. Paxton*, 201 Kan. 353, 440 P.2d 650 (1968); *State v. Adamson*, 197 Kan. 486, 419 P.2d 860 (1966); *State v. Shaw*, 195 Kan. 677, 408 P.2d 650 (1965); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); and K.S.A. 60-460(i).

In *Borserine*, the Supreme Court held that the order of proof in a conspiracy case is largely controlled by the trial judge. "A conspiracy may be established by direct proof, or circumstantial evidence, or both. Ordinarily when acts and declarations of one or more co-conspirators are offered in evidence against another co-conspirator by a third party witness or witnesses, the conspiracy should first be established *prima facie*, and to the satisfaction of the trial judge. But this cannot always be required. Where proof of the conspiracy depends on a vast amount of circumstantial evidence—a vast number of isolated and independent facts—it cannot be required. In any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced at the trial taken together shows that a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations. (*State v. Winner*, 17 Kan. 298.)" (Syl.4) *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d at 198.

In *State v. Campbell*, 217 Kan. 756, 770, 539 P.2d 329 (1975), the Court stated that a specific intent is essential to the crime of conspiracy. The Court divided the concept of intent into two elements: (1) the intent to agree or conspire, and (2) the intent to commit the offense. Quoting with approval *Wharton's Criminal Law and Procedure* § 85, the Court recognized the obvious difficulty of proving the dual intent and concluded generally that no distinction should be made between the two specific intents. The Court embraced K.S.A. 21-3201 as satisfying the intent requirement in conspiracy cases. See also *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123 (1996).

For a full discussion of the difference between conspiracy and other kinds of liability for the crimes of another, see *State v. Simmons*, 282 Kan. 728, 735-737, 148 P.3d 525 (2006).

Conspiracy is not synonymous with aiding or abetting or participating. Conspiracy implies an agreement to commit a crime; whereas, to aid and abet requires an actual participation in the act constituting the offense. See *State v. Webber*, 260 Kan. 263, 918 P.2d 609 (1996), *cert. denied*, 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997); *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998); *State v. Campbell*, 217 Kan. at 769; *State v. Rider, Edens & Lemons*, 229 Kan. 394, 625 P.2d 425 (1981).

Where there is one agreement to commit multiple crimes, a defendant may be convicted of only one count of conspiracy. *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998).

Conspiracy to commit a crime and commission of the substantive crime are separate and distinct offenses. Thus, conspiracy to commit a crime is not a lesser included offense of the substantive crime. See *State v. Burnett*, 221 Kan. 40, 45, 558 P.2d 1087 (1976).

A defendant's convictions for contributing to a child's misconduct and conspiring with the child to sell marijuana were not multiplicitous where the conspiracy was the illegal act generating the charge of contributing to a child's misconduct. *State v. Buhr*, 25 Kan. App. 2d 529, 966 P.2d 690, *rev. denied* 266 Kan. 1111 (December 22, 1998).

Conspiracy is not a continuing offense. *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991).

It is not required that a co-conspirator have a financial stake in the success of a conspiracy. It is only necessary that he be shown not to be indifferent to the outcome of the conspiracy. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

Conspiracy is not a lesser included offense of murder. See *State v. Adams*, 223 Kan. 254, 573 P.2d 604 (1977).

The elements of conspiracy as defined in K.S.A. 21-3302 were reviewed in *State v. McQueen & Hardyway*, 224 Kan. 420, 582 P.2d 251 (1978); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981); *State v. Becknell*, 5 Kan. App. 2d 269, 271, 615 P.2d 795 (1980); and *State v. Small*, 5 Kan. App. 2d 760, 762, 625 P.2d 1 (1981).

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d, 182, 205, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii (1978).

Conviction of conspiracy requires an overt act in furtherance of the agreement. In contrast, conviction of attempt requires an overt act beyond mere preparation. See *State v. McAdam*, 277 Kan. 136, 139, 83 P.3d 161 (2004).

In *State v. Taylor*, 2 Kan. App. 2d 532, 534, 583 P.2d 1033 (1978), the Court of Appeals of Kansas held that in its proof of conspiracy, the State is not limited to the overt acts alleged in the information.

Conversations among co-conspirators, planning the time, location and manner of committing the crime, do not constitute overt acts. *State v. Crockett*, 26 Kan. App. 2d 202, 204, 987 P.2d 1101 (1999).

To constitute a conspiracy there must be an agreement which requires a "meeting of the minds." See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from acts of the persons accused that were done in furtherance of the unlawful purpose. See *State v. Small*, 5 Kan. App. 2d at 762-763; *State v. Hernandez*, 24 Kan. App. 2d 285, 944 P.2d 188, *rev. denied* 263 Kan. 888 (1997); *State v. Denny*, 38 Kan. App. 2d 724, 172 P.3d 57 (2007) *rev. denied* 286 Kan. 1181 (2008).

Attempted crimes under K.S.A. 21-3301 and the crime of conspiracy under K.S.A. 21-3302 when read together do not include a crime of attempted conspiracy. See *State v. Sexton*, 232 Kan. 539, 657 P.2d 43 (1983).

K.S.A. 65-4159(b), which denies suspended sentence, community work service or probation for the crimes of unlawfully manufacturing or attempting to manufacture any controlled substance, does not prohibit a sentencing judge from granting probation to a defendant convicted of conspiracy to unlawfully manufacture methamphetamine in violation of K.S.A. 21-3302(a) and K.S.A. 65-4159(a). *State v. Moffit*, 38 Kan. App. 2d 414, 415, 166 P.3d 435 (2007).

53.040

CONSPIRACY—ACT IN FURTHERANCE DEFINED

A person may be convicted of a conspiracy only if some act in furtherance of the agreement is proved to have been committed. An act in furtherance of the agreement is any act (intentionally) (knowingly) (recklessly) committed by a member of the conspiracy in an effort to effect or accomplish an object or purpose of the conspiracy. The act itself need not be criminal in nature. It must, however, be an act which follows and tends towards the accomplishment of the object of the conspiracy. The act may be committed by a conspirator alone and it is not necessary that the other conspirator be present at the time the act is committed. Proof of only one act is sufficient.

Notes on Use

For authority, see K.S.A. 21-5302(a).

Comment

Noting that K.S.A. 21-5302(a) does not specify a culpable mental state and does not clearly dispense with a culpable mental state requirement, the Kansas Supreme Court found in *State v. Butler*, 307 Kan. 831, 416 P.3d 116 (2018), that the culpable mental state required to prove a conspiracy must be the same required for the underlying substantive offense. See also the discussion of *State v. Butler* in the Comment to PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Before July 1, 2011 Revisions to Criminal Code

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977) and *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975).

In *Campbell*, the Court observed that membership in a conspiracy could be proved only by willful, knowing and intentional conduct of the accused. In other words, a person cannot unintentionally or accidentally become a member of a conspiracy.

The State is not obligated to prove that the accused has a "stake" in the outcome of the conspiracy. All that is required is that the accused not be indifferent to its outcome. *State v. Daugherty*, 221 Kan. 612, 620, 562 P.2d 42 (1977).

A conspiracy to commit a crime is not established by mere association or knowledge of acts of other parties. There must be some intentional participation in the conspiracy with a view to the furtherance of the common design and purpose. See *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 225 Kan. 846 (1978).

The State is not limited to the overt acts alleged in the information in its proof of conspiracy. See *State v. Taylor*, 2 Kan. App. 2d 532, 583 P.2d 1033 (1978). However, a complaint that fails to allege any specific overt act committed in furtherance of the conspiracy is fatally flawed and does not confer jurisdiction to try the defendant on the conspiracy charge. *State v. Sweat*, 30 Kan. App. 2d 756, 48 P.3d 8, *rev. denied* 274 Kan. 1118 (2002). K.S.A. 22-3201(b) requires the State to set out the essential facts of the crime. K.S.A. 21-3302(a) requires specific allegation of an overt act in furtherance of the conspiracy. The State must allege more than simply an "overt act in furtherance of the conspiracy." See *State v. Shirley*, 277 Kan. 659, 89 P.3d 649 (2004).

Conversations among co-conspirators, planning the time, location and manner of committing the crime, do not constitute overt acts. *State v. Crockett*, 26 Kan. App. 2d 202, 204, 987 P.2d 1101 (1999).

The overt act for the crime of conspiracy to commit murder may be the commission of the murder itself. *State v. Wilkins*, 267 Kan. 355, 365, 985 P.2d 690 (1999).

53.050

CONSPIRACY—WITHDRAWAL AS A DEFENSE

It is a defense to a charge of conspiracy that the defendant voluntarily and in good faith withdrew from the agreement and communicated the fact of such withdrawal to any party to the agreement before any party acted in furtherance of it.

Notes on Use

For authority, see K.S.A. 21-5302(c). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

Comment

Before July 1, 2011 Revisions to Criminal Code

It is a jury question whether one has withdrawn from a conspiracy when conflicting evidence as to that withdrawal is presented. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

Withdrawal is a defense to conspiracy, but there is no statutory defense of withdrawal to aiding and abetting other crimes. *State v. Kaiser*, 260 Kan. 235, 918 P.2d 629 (1996); *State v. Speed*, 265 Kan. 26, 961 P.2d 13 (1998).

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53.060

CONSPIRACY—DEFINED

A conspiracy is an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement.

The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all of the facts and circumstances.

Notes on Use

For authority, see K.S.A. 21-5302(a) and the *Kansas Judicial Council Bulletin*, April 1968, p.46. *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); *State v. Small*, 5 Kan. App. 2d 760, 625 P.2d 1 (1981); 16 Am. Jur. 2d, Conspiracy, §§ 1, 7, and 11. This instruction should be given in all cases involving the crime of conspiracy.

Comment

Before July 1, 2011 Revisions to Criminal Code

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Cox*, 258 Kan. 557, 908 P.2d 603 (1995); *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also *State v. Daughtery*, 221 Kan. 612, 562 P.2d 42 (1977).

In *Campbell*, the Supreme Court of Kansas emphasized that the essence of a conspiracy is the agreement to commit a crime, not simply to commit a particular act. The Court further held that the provisions of K.S.A. 21-3302 were not unconstitutionally vague and indefinite. 217 Kan. at 770.

Where there is one agreement to commit multiple crimes, a defendant may be convicted of only one count of conspiracy. *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998).

The agreement may be expressed or implied from the acts of the parties. *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

The agreement requires a "meeting of the minds" of at least two persons. See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

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53.070

CONSPIRACY—DECLARATIONS

You may consider declarations of one conspirator as evidence against all co-conspirators if the declarations were made when:

- 1. two or more conspirators were participating in a plan to commit a crime;**
- 2. the plan to commit the crime was in existence; and**
- 3. the plan to commit the crime had not been completed.**

Notes On Use

For authority, see K.S.A. 60-460(i)(2). The co-conspirator evidence rule is discussed in the Comment to PIK 4th 53.030, Conspiracy.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Bird*, 238 Kan. 160, 176, 708 P.2d 946 (1985), the Supreme Court set forth the five prerequisites for utilizing K.S.A. 60-460(i)(2). See also *State v. Shultz*, 252 Kan. 819, 850 P.2d 818 (1993). The co-conspirator's statement need not be "in furtherance" of the conspiracy but must be "relevant" to the conspiracy. See also *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 198-199, 577 P.2d 803 (1978).

The determination of whether a conspiracy exists for purpose of the hearsay exception [K.S.A. 60-460(i)(2)] rests with the judge not the jury. *State v. Butler*, 257 Kan. 1043, 897 P.2d 1007 (1995).

"In order to show a conspiracy, it is not necessary that there be any formal agreement manifested by formal words written or spoken; it is enough if the parties tacitly come to an understanding in regard to the unlawful purpose, and this may be inferred from sufficiently significant circumstances. *State v. Sherry*, 233 Kan. 920, 934, 667 P.2d 367 (1983)." *State v. Swafford*, 257 Kan. 1023, 897 P.2d 1027 (1995).

Under K.S.A. 60-460(i)(2), hearsay statements by a coparticipant that implicate the accused in a crime are admissible against the accused only if made "while the plan to commit the crime is in existence and 'before its complete execution or other termination.'" *State v. Myers*, 229 Kan. 168, 625 P.2d 1111 (1981). See also *State v. Johnson-Howell*, 255 Kan. 928, 881 P.2d 1288 (1994).

Three cases decided in 2006 dealt with the question of the admission of the declarations of a coconspirator after *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004). In *State v. Jackson*, 280 Kan. 16, 118 P.3d 1238 (2006), the Supreme Court noted

that the statements of a coconspirator are not testimonial, so *Crawford* does not preclude the admissibility of statements offered pursuant to K.S.A. 60-460(i)(2). However, in *State v. Nguyen*, 281 Kan. 702, 133 P.3d 1259 (2006), the Court clarified that even without *Crawford*, statements of coconspirators, made after the crime has been consummated (in this case, a statement made to an investigating police officer), are not admissible pursuant to K.S.A. 60-460(i)(2). Accord, *State v. Wilson*, 35 Kan. App. 2d 333, 130 P.3d 139 (2006).

53.080

CONSPIRACY—SUBSEQUENT ENTRY

All of the conspirators need not enter into the agreement at the same time. If a person later joins an already formed conspiracy with knowledge of its unlawful purpose, that person may be found guilty as a conspirator.

Notes on Use

For authority, see *State v. Becknell*, 5 Kan. App. 2d 269, 272, 615 P.2d 795 (1980); and *State v. Johnson*, 253 Kan. 356, 856 P.2d 134 (1993).

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53.090

CRIMINAL SOLICITATION

The defendant is charged with solicitation to commit insert crime, a felony. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant intentionally (commanded) (encouraged) (requested) insert name (to commit) (attempt to commit) insert crime, a felony.

OR

1. The defendant intentionally (commanded) (encouraged) (requested) insert name to aid and abet in the (commission) (attempted commission) of insert crime, a felony, for the purpose of promoting or facilitating the felony.

2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

The definition of insert crime, the felony charged to be the subject of the solicitation, is as (follows: _____) (set forth in Instruction No. _____).

Notes on Use

For authority, see K.S.A. 21-5303. K.S.A. 21-5303(d) provides that soliciting another to commit an off-grid felony (murder in the first degree, treason) is a severity level 3 crime. Soliciting another to commit any other nondrug felony offense is ranked three crime severity levels below the appropriate level for the completed crime. The lowest severity level for soliciting another to commit a nondrug felony offense is severity level 10.

K.S.A. 21-5303(e) provides that conviction for solicitation of a drug felony reduces the prison term prescribed in the sentencing grid for the underlying or completed crime by six months.

Notwithstanding the penalties set forth in K.S.A. 21-5303(d) and (e), solicitation to commit the crime of terrorism, K.S.A. 21-5421, is an off-grid, person felony. Solicitation to commit any of the following crimes is an off-grid, person felony when the offender is 18 or more years old and the victim is less than 14 years old: aggravated human trafficking, K.S.A. 21-5426; rape, K.S.A. 21-5503; aggravated indecent liberties, K.S.A. 21-5506; aggravated criminal sodomy, K.S.A. 21-5504; commercial sexual exploitation of a child, K.S.A. 21-6422; aggravated internet trading in child pornography, K.S.A. 21-5514; and sexual exploitation of a child, K.S.A. 21-5510.

The name of the applicable crime should be set forth in the first sentence of the instruction and the statutory definition of that crime should be set forth in the concluding portion of the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

The crime of solicitation is separate and distinct from an attempt to commit a crime or from the crime of conspiracy. Solicitation is in the nature of preparation; whereas, an attempt involves an overt act beyond the solicitation. See *State v. Bowles*, 70 Kan. 821, 837, 79 Pac. 726 (1905); and 21 Am. Jur. 2d, Criminal Law, §§ 161 and 162. Solicitation is distinguished from the crime of conspiracy in that the latter requires an agreement between two or more persons to commit, or assist in committing, a crime along with an overt act in furtherance of the object of the conspiracy. See *State v. Garrison*, 252 Kan. 929, 850 P.2d 244 (1993); *State v. Crozier*, 225 Kan. 120, 126, 587 P.2d 331 (1978). The crime of solicitation, on the other hand, is complete when the solicitation request is made without the requirement of an agreement or an overt act. *State v. Westfahl*, 21 Kan. App. 2d 159, 898 P.2d 87 (1995).

PIK 55.09 was approved as a correct statement of the offense of criminal solicitation in *State v. Westfahl*, supra.

It should be noted that subsection (b) provides that it is immaterial ". . . that the actor fails to communicate with the person solicited to commit a felony if the person's conduct was designed to effect a communication." Apparently, this subsection covers the unusual situation where one might place an offer in a newspaper or use some other form of communication or utilize the concepts of an agency to carry out the prohibited solicitation. In the event the provision becomes material, an appropriate paraphrase of the statute should be presented.

In a "loan scam" case, the defendants' convictions of criminal solicitation and aiding and abetting were held neither to have merged nor to have been multiplicitous. *State v. Edwards*, 250 Kan. 320, 826 P.2d 1355 (1992).

Solicitation to commit first-degree murder is a separate and independent criminal offense from aiding and abetting first-degree murder, and the jury need not be instructed on criminal solicitation as a lesser included offense. *State v. Webber*, 260 Kan. 263, 918 P.2d 609 (1996); *State v. DePriest*, 258 Kan. 596, 907 P.2d 868 (1995).

An alternative request, i.e., that a friend either raise the money to post the defendant's bond or murder the complaining witness, constituted sufficient evidence to support a conviction of criminal solicitation. *State v. Mason*, 268 Kan. 37, 40, 986 P.2d 387 (1999).

"Solicitation is a specific intent crime under Kansas law. A person is not guilty of solicitation unless he or she intentionally commits the actus reus of the offense, viz., he or she commands, encourages, or requests another person to commit a felony with the specific intent that the other commit the crime he or she solicited. The actus reus of the solicitation occurs under Kansas law if a person by words or actions invites, requests, commands, or encourages a second person to commit a crime. The crime is complete when the person communicates the solicitation to another with the requisite mens rea. No act in furtherance of the target crime needs to be performed by either person." *State v. DePriest*, 258 Kan. 596, 907 P.2d 868 (1995). See also *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123 (1996).

53.100

CRIMINAL SOLICITATION—DEFENSE

It is a defense to a charge of criminal solicitation that the defendant, after soliciting another person to commit a felony, persuaded that person not to do so or otherwise prevented the commission of the felony, under circumstances demonstrating a complete and voluntary abandonment of the defendant's criminal plan.

Notes on Use

For authority, see K.S.A. 21-5303(c). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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54.010**CAPITAL MURDER— DEATH PENALTY SOUGHT BY STATE—
PRE-VOIR DIRE INSTRUCTION**

In this case, the defendant is charged with the crime of capital murder. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether the defendant is guilty of capital murder and is instructed concerning the claims the state must prove to establish that charge. If the jury unanimously finds that the defendant is guilty of capital murder, then the second phase begins in which the same jury decides whether the defendant should be sentenced to death.

If there is a second phase, the jury will be separately instructed concerning the claims that must be proved for the death penalty to be imposed. The jury will also be instructed at that time that the defendant will be sentenced by the judge to imprisonment for life with no possibility of parole if a sentence of death is not imposed.

Notes on Use

This is an optional instruction that the trial court may wish to use prior to commencement of voir dire in a capital murder case in which the state is seeking the death penalty. In districts where the practice includes the use of a questionnaire, the Committee recommends that such questionnaire include a prefatory statement similar to the above.

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54.020

CAPITAL MURDER—ELEMENTS OF THE OFFENSE

The defendant is charged with capital murder. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant intentionally killed insert name [and insert name].
2. The killing(s) was (were) done with premeditation.
3. The killing was done in the commission of a (kidnapping) (aggravated kidnapping) when the (kidnapping) (aggravated kidnapping) was committed with the intent to hold insert name for ransom.

OR

3. The killing was done pursuant to a contract or agreement to kill insert name.

OR

3. The defendant was an inmate or prisoner (confined in a state correctional institution) (confined in a community correctional institution) (confined in a jail) (in the custody of an officer or employee of a [state correctional institution] [community correctional institution] [jail]).

OR

3. Insert name was a victim of (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy), and such killing was done in the commission of or subsequent to such (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy).

OR

3. Insert name was a law enforcement officer.

OR

3. The killings of insert name and (insert other victim[s]) (were part of the same act or transaction) (were part of two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct).

OR

3. Insert name was a child under the age of 14 years and such killing was done in the commission of (kidnapping) (aggravated kidnapping) when such (kidnapping) (aggravated kidnapping) was done with intent to commit a sex offense upon or with insert name or with intent that insert name commit or submit to a sex offense.
4. The defendant was 18 or more years old at the time the killing occurred.
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[The elements of insert crime from Element No. 3, first, fourth, or seventh options are (set forth in Instruction No. _____) (as follows:

_____.)]

[As used in this instruction, "law enforcement officer" means any person who by virtue of such person's office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes, an officer of the Kansas Department of Corrections, or a university police officer or campus police officer.]

[As used in this instruction, "sex offense" means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, the sale of sexual relations, promoting the sale of sexual relations, commercial sexual exploitation of a child, or sexual exploitation of a child.]

Notes on Use

For authority, see K.S.A. 21-5401. Capital murder is an off-grid person felony subject to a possible sentence of death.

Definitions of the terms "intentional" and "premeditation," as found at PIK-Criminal 4th 54.150, Homicide Definitions, should be included in the instruction.

The definition of "law enforcement officer" is found at K.S.A. 21-5111(p) and should be included in the instruction when using the fifth alternative for Element No. 3. The definition of "sex offense" is found at K.S.A. 21-5401(b) and should be included when using the last alternative for Element No. 3.

Use the bracketed paragraph when defendant is charged with a capital murder done in the commission of or subsequent to another offense.

In the case of murder for hire, any party to the contract or agreement may be charged with capital murder. K.S.A. 21-5401(a)(2). Modifications to this instruction will be necessary in those cases where the defendant was not the person who committed the killing.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

Comment

In *State v. Cheever*, 295 Kan. 229, 264-265, 284 P.3d 1007 (2012) [*Cheever I*], *reversed on other grounds sub nom. Kansas v. Cheever*, 571 U.S. 87, 134 S. Ct. 596, 187 L. Ed. 2d 519 (2013), the Kansas Supreme Court held that because the death penalty only applies to defendants 18 or older when the crime occurs, the defendant's age at the time of the crime is necessarily a fact that must be submitted to the jury and proven unanimously beyond a reasonable doubt.

However, on remand, the Kansas Supreme Court held that a harmless error analysis was appropriate on the question of defendant's age given that "the evidence leads to the conclusion beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *State v. Cheever*, 304 Kan. 866, 898, 375 P.3d 979 (2016) [*Cheever II*].

In *Cheever I*, the Kansas Supreme Court also held that felony murder is a lesser included offense of capital murder, and the jury should be instructed on this crime when supported by the evidence. 295 Kan. at 258-259. However, in *State v. Carr*, 300 Kan. 1, 221, 331 P.3d 544 (2014), *reversed on other grounds by Kansas v. Carr*, 577 U.S. ___, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016), the Kansas Supreme Court held that K.S.A. 21-5402(d), enacted after *Cheever I* and providing that felony murder is not a lesser included offense of capital murder, applies retroactively to obviate the necessity of felony-murder instructions in capital-murder cases.

In *State v. Gleason*, 299 Kan. 1127, 1150-1151, 329 P.3d 1102 (2014), *reversed on other grounds by Kansas v. Carr*, 577 U.S. ___, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016), the Kansas Supreme Court construed K.S.A. 21-3439(a)(6) [now K.S.A. 21-5401(a)(6)]. For multiple killings to be part of the same act or transaction or part of a common scheme, they must be related to one another in some way. The court also held that "the State may rely on the theory of aiding and abetting to support one or more of the intentional, premeditated murders necessary to support a capital murder charge . . . for the killing of multiple victims."

See also *State v. Robinson*, 303 Kan. 11, 202-207, 363 P.3d 875 (2015), in which the Supreme Court reiterated that in multiple-victim cases prosecuted under subsection (a)(6) of the capital murder statute, it is sufficient that the state prove the killings were related to one another in some way in order for them to be part of a common scheme or course of conduct.

Premeditated first-degree murder is a lesser included offense of capital murder. *State v. Martis*, 277 Kan. 267, 83 P.3d 1216 (2004).

In *State v. Harris*, 284 Kan. 284, Syl. ¶¶ 6, 7, 162 P.3d 28 (2007), the Kansas Supreme Court ruled that on the particular facts of that case, under K.S.A. 21-3439(a)(6), the defendant could be convicted of only one count of capital murder for the killing of four persons.

In *State v. Scott*, 286 Kan. 54, 68, 75, 183 P.3d 801 (2008), the Kansas Supreme Court held that when a capital murder charge under K.S.A. 21-3439(a)(6) is based upon the killing of multiple victims as part of the same act or transaction, or several acts connected together, or as part of a common scheme, the elements jury instruction should specifically include a claim that the defendant killed each of the victims. Furthermore, the capital murder conviction precludes additional convictions for the deaths of the other victims on the grounds of multiplicity. See also *Trotter v. State*, 288 Kan. 112, Syl. ¶ 1, 200 P.3d 1236 (2009).

54.030

**CAPITAL MURDER—DEATH SENTENCE—
SENTENCING PROCEEDING**

Because the defendant has been found guilty of capital murder, a separate sentencing proceeding will now be conducted to determine whether the defendant shall be sentenced to death. At this hearing, you shall consider all evidence presented concerning the question of sentence, including evidence of aggravating and mitigating circumstances.

It is my duty to instruct you in the law that applies to this sentencing proceeding, and it is your duty to consider and follow all of the instructions. You must decide the question of the sentence by applying these instructions to the facts as you find them.

Notes on Use

For authority, see K.S.A. 21-6617(b) and (c).

Not later than seven days after the time of arraignment, the county or district attorney or the attorney general shall file and serve upon the defendant or defendant's attorney written notice of an intention to request a separate sentencing proceeding to determine whether the defendant, if convicted of capital murder, should be sentenced to death. If the written notice is not filed and served in a timely manner, the death sentencing proceeding is not permitted and the defendant shall be sentenced upon conviction of capital murder to life without the possibility of parole. K.S.A. 21-6617(a).

Under K.S.A. 21-6620(a)(1), if a defendant is convicted of capital murder and a sentence of death is not imposed, the defendant must be sentenced to life without the possibility of parole.

An attempt to commit capital murder carries a sentence of imprisonment for life without the possibility of parole for 25 years, or longer if the defendant's criminal history presumes a prison sentence of more than 300 months, in which case the longer sentence must be served without parole. K.S.A. 21-6620(a)(2).

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54.040

**CAPITAL MURDER—DEATH SENTENCE—
AGGRAVATING CIRCUMSTANCES**

Aggravating circumstances are those that increase the enormity of the crime of capital murder or add to its injurious consequences.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

1. [The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.] and/or
2. [The defendant knowingly or purposely killed or created a great risk of death to more than one person.] and/or
3. [The defendant committed the crime of capital murder for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.] and/or
4. [The defendant authorized or employed another person to commit the crime of capital murder.] and/or
5. [The defendant committed the crime of capital murder in order to avoid or prevent a lawful arrest or prosecution.] and/or
6. [The defendant committed the crime of capital murder while serving a sentence of imprisonment on conviction of a felony.] and/or
7. [The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.] and/or
8. [The defendant committed the crime of capital murder in an especially heinous, atrocious or cruel manner. As used in this instruction, the following definitions apply:
 - "heinous" means extremely wicked or shockingly evil;
 - "atrocious" means outrageously wicked and vile; and
 - "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the sufferings of others.

Conduct which is heinous, atrocious, or cruel may include, but is not limited to:

- **prior stalking of or criminal threats to the victim;**
- **preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious, or cruel;**
- **infliction of mental anguish or physical abuse before the victim's death;**
- **torture of the victim;**
- **continuous acts of violence begun before or continuing after the killing;**
- **desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or**
- **any other conduct you expressly find is especially heinous.**

A finding that the victim was aware of the victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious, or cruel.]

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

Notes on Use

For authority, see K.S.A. 21-6617(c) and K.S.A. 21-6624(a-h). This instruction should be used in all cases involving the death sentence proceeding.

The applicable clauses in brackets should be selected as contained in the written notice and as supported by the evidence.

"Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or the state of Kansas shall be admissible." K.S.A. 21-6617(c).

Comment

Before July 1, 2011 Revisions to Criminal Code

"In order to find that a murder was committed in an especially heinous, atrocious, or cruel manner so as to satisfy the aggravating circumstance contained in K.S.A. 21-4625(6), the jury must find that the perpetrator inflicted mental anguish or physical abuse before the victim's death. The Kansas definition of 'heinous, atrocious or cruel' narrows the class of death eligible defendants consistent with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution." *State v. Kleypas*, 272 Kan. 894, 1029, 40 P.3d 139 (2001).

Also contained in *Kleypas*, 272 Kan. at 1019-25, is an analysis regarding the defendant's constitutional and evidentiary challenge to the "avoid arrest" aggravating circumstance relied upon by the State. In a later section of the opinion, the court also distinguishes the aggravating circumstance of "heinous, atrocious or cruel manner" from the aggravating circumstance of "avoiding arrest." 272 Kan. at 1082-3.

In *State v. Kleypas*, 282 Kan. 560, 570-71, 147 P.3d 1058 (2006), the Kansas Supreme Court ruled that evidence of stalking by the defendant may be admitted during the penalty phase of a capital murder case if the trial court finds such evidence to be relevant on the question of whether the victim suffered "serious physical abuse or mental anguish" prior to death, and thus whether the killing was done in a "heinous, atrocious or cruel manner."

In *State v. Scott*, 286 Kan. 54, 100, 183 P.3d 801 (2008), the Kansas Supreme Court held that duplicating an element of the crime of capital murder as an aggravating circumstance in the penalty phase is constitutional and conforms to the legislative intent in Kansas that killing of more than one person can be used for both purposes. The *Scott* court further held that the term "crime" in the list of aggravating circumstances refers to the crime of capital murder and the jury instruction on aggravating circumstances should make this explicitly clear.

In *State v. Bailey*, 251 Kan. 156, 174, 834 P.2d 342 (1992), the Supreme Court rejected defendant's argument that the second, fifth and sixth clauses of aggravated circumstances are unconstitutionally vague. The decision noted that the trial court had included the *Foster* definitions in the instructions.

In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Supreme Court rejected the argument that the fifth aggravating circumstance, murder to avoid arrest or prosecution, requires proof that an arrest was imminent or that avoiding arrest was the dominant motive for the murder. Furthermore, the sixth aggravating circumstance, murder committed in an especially heinous, atrocious or cruel manner, encompasses conduct after a victim has been rendered unconscious. Abuse of the body after the victim is dead is not relevant to the manner in which the murder was committed.

In *State v. Cromwell*, 253 Kan. 495, 856 P.2d 1299 (1993), the Supreme Court held the third aggravating circumstance, murder for the purpose of receiving money or any other thing of monetary value, is not limited to cases involving murder for hire.

In *State v. Willis*, 254 Kan. 119, 864 P.2d 1198 (1993), the Supreme Court returned to the problem of definitions in the sixth clause. The court noted that the definitions referenced in *Bailey* did not include the complete instruction from *Foster* and directed that the sixth clause be revised. The language approved in *Willis* is now included in the sixth clause.

Bailey, Kingsley, Cromwell, and Willis examined the aggravating factors in the context of a "Hard 40" sentencing proceeding. Care should be exercised in applying these opinions in a death sentence case. The Supreme Court has expressed the view that death is a penalty different from all other sanctions and therefore death penalty cases are of limited precedential value in resolving "Hard 40" cases. See *Bailey*, 251 Kan. at 171; *Cromwell*, 253 Kan. at 513. Presumably, the reverse is also true.

54.050

**CAPITAL MURDER—DEATH SENTENCE—
MITIGATING CIRCUMSTANCES**

Mitigating circumstances are those that in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or that justify a sentence of less than death, even though they do not justify or excuse the offense.

The appropriateness of exercising mercy can itself be a mitigating circumstance in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as individual jurors to decide under the facts and circumstances of the case.

The defendant contends that mitigating circumstances include, but are not limited to, the following:

- 1. [The defendant has no significant history of prior criminal activity.]**
and/or
- 2. [The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.]**
and/or
- 3. [The victim was a participant in or consented to the defendant's conduct.]**
and/or
- 4. [The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.]**
and/or
- 5. [The defendant acted under extreme distress or under the substantial domination of another person.]**
and/or
- 6. [The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.]**
and/or

7. [The age of the defendant at the time of the crime.]
and/or
8. [At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.]
and/or
9. [A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.] and/or
10. [Other_____].]

You may further consider as a mitigating circumstance any other aspect of the defendant's character, background, or record, and any other aspect of the offense that was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance found to exist.

Notes on Use

For authority, see K.S.A. 21-6617(c) and 21-6625. The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the death sentence proceeding.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Kleypas*, 272 Kan. 1034-6, 40 P.3d 139 (2001), the Supreme Court approved the trial court's instruction to the jury on the exercise of mercy as a mitigating circumstance. The court also approved an instruction using language similar to that found in the first paragraph and first sentence of the third paragraph of PIK 3d 56.00-D. 272 Kan. at 1073-5. The court also recommended that language similar to the last two sentences of the third paragraph of PIK 3d 56.00-D be adopted. 272 Kan. at 1078. The court held that the jury need not find mitigating factors in writing. 272 Kan. at 1054.

In *State v. Scott*, 286 Kan. 54, 68, 75, 183 P.3d 801 (2008), the Kansas Supreme Court held that the trial court's failure to adequately instruct the jury that unanimity is not required in order to find the existence of mitigating circumstances will likely lead to reversal of a sentence of death and a remand for a new sentencing proceeding.

K.S.A. 21-4626 is not an exclusive list of mitigating factors. In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the United States Supreme Court held that under the Georgia statute, once a jury has determined that an aggravating factor exists, "[t]he jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the trial court." 428 U.S. 197.

In *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993), the court examined instructions given during the sentencing proceeding of a "Hard 40" case. The court held that the trial court created confusion by instructing the jury that "neither sympathy nor prejudice should influence you," and at the same time telling the jury that it may consider all mitigating circumstances which, "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

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54.060

**CAPITAL MURDER—DEATH SENTENCE—
STATE'S BURDEN OF PROOF**

The State must prove beyond a reasonable doubt that one or more aggravating circumstances exist, and that the aggravating circumstances are not outweighed by any mitigating circumstances found to exist.

Notes on Use

For authority, see K.S.A. 21-6617(e).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), the Kansas Supreme Court ruled the death penalty unconstitutional. The court said the section of the statute mandating the death penalty when the jury found aggravating and mitigating circumstances weighed equally, the equipoise provision, violated the Eighth and Fourteenth Amendments to the United States Constitution. This ruling was reversed by the United States Supreme Court in *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). On remand, the Kansas Supreme Court in *State v. Marsh*, 282 Kan. 38, 144 P.3d 48 (2006), vacated that portion of its prior opinion finding the equipoise provision violated the Eighth and Fourteenth Amendments.

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54.061

**CAPITAL MURDER—DEATH SENTENCE—PROOF
OF MITIGATING CIRCUMSTANCES**

Mitigating circumstances are not required to be proved beyond a reasonable doubt. They must only be proved to the satisfaction of the individual juror in that juror's sentencing decision.

The same mitigating circumstances are not required to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Notes on Use

For authority, see K.S.A. 21-6617(e).

In Kansas, capital-phase juries must be instructed that mitigating circumstances need not be proved beyond a reasonable doubt. *State v. Gleason*, 305 Kan. 794, 800, Syl. ¶ 4, 388 P.3d 101 (2017) (*Gleason II*); *State v. Cheever*, 304 Kan. 866, 886, 375 P.3d 979 (2016) (*Cheever II*).

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54.070

**CAPITAL MURDER—DEATH SENTENCE—AGGRAVATING
AND MITIGATING CIRCUMSTANCES—
THEORY OF COMPARISON**

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances found to exist, your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

Notes on Use

This instruction should be given in all death sentence proceedings to provide guidance to the jury that their decision should not be determined solely by the number of aggravating or mitigating circumstances that are shown to exist.

Comment

Before July 1, 2011 Revisions to Criminal Code

This instruction was cited with approval in *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008). See also *State v. Gleason*, 299 Kan. 1127, 329 P.3d 1102 (2014), *rev'd and remanded on other grounds sub nom. Kansas v. Carr*, 577 U.S. ___, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016).

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54.080

**CAPITAL MURDER—DUTY TO INFORM JURY OF
ALTERNATIVE SENTENCE ABSENT DEATH SENTENCE**

This advisory alert instruction for pre-2004 crimes was deleted because the Committee no longer considers it necessary.

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54.090

**CAPITAL MURDER—DEATH SENTENCE—
ALTERNATIVE SENTENCE**

If you find unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and they are not outweighed by any mitigating circumstances found to exist, you shall impose a sentence of death. If you sentence the defendant to death, designate on the appropriate verdict form the aggravating circumstances that you unanimously found beyond a reasonable doubt.

If you do not find unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and they are not outweighed by any mitigating circumstances found to exist, indicate on the appropriate verdict form that the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be sentenced to death but will be sentenced by the court to imprisonment for life with no possibility of parole.

Notes on Use

For authority, see K.S.A. 21-6617(e).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, (1994), the United States Supreme Court held that, when a defendant's future dangerousness is at issue in a death penalty proceeding, and state law prohibits his or her release on parole, due process requires that the sentencing jury be informed the defendant is parole ineligible. The Court commented, however, that in a case where a defendant is eligible for parole, the State may reasonably conclude that information about parole eligibility should be kept from the jury.

Although *Simmons* does not seem to require it, the Committee believes it is appropriate to inform the jury that the judge will sentence a defendant who is not sentenced to death. The statement in the instruction for crimes committed prior to July 1, 2004, is phrased in general terms because the trial judge will have several options in sentencing such a defendant.

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54.100

**CAPITAL MURDER—DEATH SENTENCE—
SENTENCING DECISION**

At the conclusion of your deliberations, you shall sign the appropriate verdict form.

You have been provided two verdict forms that provide the following alternative verdicts:

A. Finding unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and they are not outweighed by any mitigating circumstances found to exist, and sentencing the defendant to death.

OR

B. Stating that the jury is unable to reach a unanimous verdict sentencing the defendant to death.

Notes on Use

For authority, see K.S.A. 21-6617(e).

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54.110

MURDER IN THE FIRST DEGREE

- A. The defendant is charged with murder in the first degree. The defendant pleads not guilty.**

OR

- B. If you do not agree that the defendant is guilty of capital murder, you should then consider the lesser included offense of murder in the first degree.**

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally killed insert name.**
- 2. The killing was done with premeditation.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5402(a)(1). Murder in the first degree is an off-grid, person felony. For capital murder, see PIK 4th 54.020, Capital Murder—Elements of the Offense. For felony murder, see PIK 4th 54.120, Murder in the First Degree—Felony Murder. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment to PIK 4th 54.120, for authority to instruct on both theories.

If the information charges murder in the first degree, omit paragraph B; but if the information charges capital murder, omit paragraph A. See PIK 4th 68.080, Lesser Included Offenses, and PIK 4th 69.010, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

Definitions of the terms "intentional" and "premeditation," as found at PIK 4th 54.150, Homicide Definitions, should be included in the instruction.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

Comment

Second degree intentional murder is a lesser included offense of first-degree premeditated murder. *State v. McLinn*, 307 Kan. 307, Syl. ¶ 2, 409 P.3d 1 (2018).

In *State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018), the Supreme Court held a district court is not required to instruct a jury to consider a lesser included homicide offense simultaneously with any greater homicide offense. Overruling *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003), the court found the rule requiring simultaneous consideration of the lesser included offense of voluntary manslaughter contemporaneously with premeditated first-degree murder and intentional second-degree murder was confusing, unworkable, and without basis in statute or the Constitution. "The kind of sequential instructions contemplated by our pattern instructions eliminate the confusion and difficulty that will surely ensue when a jury is instructed to simultaneously consider first-degree murder and every lesser included offense at the same time." See also *State v. James*, 309 Kan. 1280, 443 P.3d 1063 (2019).

Before July 1, 2011 Revisions to Criminal Code

"In a homicide case, the corpus delicti is the body or substance of the crime which consists of the killing of the decedent by some criminal agency, and is established by proof of two facts, that one person was killed, and that another person killed him." Such may be proved by circumstantial evidence. *State v. Doyle*, 201 Kan. 469, 441 P.2d 846 (1968).

A helpful discussion of murder and manslaughter is found in *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). There it is said, "At the common law, homicides were of two classes only, those done with malice aforethought, either express or implied and called murder, and those done without malice aforethought and called manslaughter." Effective July 1, 1993, however, the Legislature has deleted "malice" from the statutory definition of murder in the first degree.

The definition of "death" as set out in K.S.A. 77-202 (Repealed L. 1984, ch. 345, § 4) applies in criminal cases. *State v. Shaffer*, 223 Kan. 244, 574 P.2d 205 (1977).

It is the duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inconclusive. The duty only arises when the evidence and trial would support a conviction of the lesser offense. *State v. Yarrington*, 238 Kan. 141, 143, 708 P.2d 524 (1985).

Premeditated first-degree murder is a lesser included offense of capital murder. *State v. Martis*, 277 Kan. 267, 83 P.3d 1216 (2004). For a thorough analysis on lesser included offenses, see *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977).

In rejecting the defendant's complaint to the words, "if you do not agree," when used to preface an instruction to a lesser charge, the court held the words are not coercive and no inference arises with the jury that an acquittal of the greater charge is required before considering the lesser. *State v. Roberson*, 272 Kan. 1143, 38 P.3d 715 (2002).

Evidence of defendant's voluntary intoxication alone will not justify an instruction on reckless second-degree murder as a lesser offense of premeditated first-degree murder. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004); *State v. Cavaness*, 278 Kan. 469, 101 P.3d 717 (2004).

It is not error to instruct the jury to consider first-degree murder before considering imperfect self-defense. Premeditation and imperfect self-defense are distinguishable on the basis that premeditation requires one to have thought over, not just any matter, but the matter of an intentional killing beforehand and to have formed the design or intent to kill before the act, whereas a person asserting imperfect self-defense has thought over the matter of defense of one's self or another, whether reasonable or unreasonable. *State v. Lawrence*, 281 Kan. 1081, 135 P.3d 1211 (2006).

HARD 50 JURY INSTRUCTIONS NOTICE

As of July 1, 1994, and continuing for almost two decades, the determination of Hard 40 and Hard 50 (beginning July 1, 1999) sentences was the sole responsibility of the trial judge. Hard 40 instructions were left in PIK Criminal 3rd for eligible crimes occurring prior to July 1, 1994. See PIK Criminal 3d 56.01-A through 56.01-G. These instructions were finally omitted when PIK Criminal 4th was published in 2012.

In 2013 the U.S. Supreme Court decided *Alleyne v. US*, 133 S. Ct. 2151 (June 17, 2013), holding that facts that increase mandatory minimum sentences must be submitted to the jury and found beyond a reasonable doubt. In response to *Alleyne*, the Kansas legislature met in special session and amended the Hard 50 statute, K.S.A. 21-6620, to provide for jury involvement. These amendments were effective September 6, 2013, and were addressed in the 2013 supplement to PIK Criminal 4th.

In the 2014 regular session the Kansas legislature enacted further changes to K.S.A. 21-6620. As of July 1, 2014, Hard 50 is now the presumptive sentence to be imposed by the trial judge for any premeditated first degree murder committed on or after that date. There is no longer a determination of aggravating circumstances. The trial judge may reduce the sentence to a Hard 25. The jury is not involved in the sentencing of these post July 1, 2014 murders.

Revised Hard 50 instructions for premeditated first degree murders committed prior to July 1, 2014, are found hereafter at 54.111 through 54.113. Corresponding verdict forms are found at 68.175 and 68.176. Slightly different procedures apply depending on whether the crime occurred prior to September 6, 2013, or on or after that date and prior to July 1, 2014.

54.111

PREMEDITATED MURDER IN THE FIRST DEGREE— MANDATORY MINIMUM 50 YEAR SENTENCE— CRIMES COMMITTED ON OR AFTER SEPTEMBER 6, 2013 AND PRIOR TO JULY 1, 2014

Because the defendant has been found guilty of premeditated murder in the first degree, Kansas law provides that a separate proceeding shall now be conducted to determine whether the defendant shall serve a mandatory

minimum 50 year term of imprisonment. At this hearing you shall consider all evidence admitted by the court and determine whether one or more aggravating circumstances exist.

The State has the burden to prove beyond a reasonable doubt that one or more aggravating circumstances exist. A jury finding that any one or more aggravating circumstances exist must be unanimous.

The presiding juror shall designate in writing any aggravating circumstance which the jury finds to exist. A verdict form is hereafter provided for that purpose.

Notes on Use

For authority, see K.S.A. 21-6620(d), as amended by 2014 Session Laws (Ch. 114, Sec. 4), effective July 1, 2014. The prosecuting attorney must provide the defendant with reasonable notice of the State's intent to seek a mandatory minimum 50 year sentence (Hard 50). K.S.A. 21-6620(d)(1). The original trial jury or its alternate jurors shall serve in the Hard 50 proceeding. If there are insufficient alternate jurors to replace any trial jurors unable to serve in the Hard 50 proceeding, the proceeding may be conducted in front of as few as 6 jurors. If the trial jury has been discharged prior to the Hard 50 proceeding, a new jury shall be impaneled. K.S.A. 21-6620(d)(2). A jury may only consider evidence of the aggravating circumstances enumerated in K.S.A. 21-6624 which was made known to the defendant prior to the Hard 50 proceeding. K.S.A. 21-6620(d)(3).

This instruction should be preceded by the applicable introductory and cautionary instructions as contained in PIK 4th 50.040, 50.050, and 50.070.

A sentencing proceeding for a premeditated first degree murder committed on or after July 1, 2014 is conducted by the trial judge without a jury. K.S.A. 21-6620(c).

54.112

**PREMEDITATED MURDER IN THE FIRST DEGREE—
MANDATORY MINIMUM 50 YEAR SENTENCE—
CRIMES COMMITTED ON OR AFTER JULY 1, 1999
AND PRIOR TO SEPTEMBER 6, 2013**

Because the defendant has been found guilty of premeditated murder in the first degree, Kansas law provides that a separate proceeding shall now be conducted to determine whether the defendant shall serve a mandatory minimum 50 year term of imprisonment. At this hearing you shall consider all evidence admitted by the court regarding sentence, including evidence of aggravating and mitigating circumstances.

The State has the burden to prove beyond a reasonable doubt the existence of one or more aggravating circumstances, and that such aggravating circumstances are not outweighed by any mitigating circumstances found to exist. Any finding by the jury that one or more aggravating circumstances exist must be unanimous. Any finding by the jury that aggravating circumstances are not outweighed by mitigating circumstances must be unanimous.

The presiding juror shall designate in writing any aggravating circumstance which the jury finds to exist. The presiding juror shall designate in writing the jury's determination as to whether any aggravating circumstances found to exist were outweighed by any mitigating circumstances found to exist. A verdict form is hereafter provided for that purpose.

Notes on Use

For authority, see K.S.A. 21-6620(e), as amended by 2014 Session Laws (Ch. 114), effective July 1, 2014. The prosecuting attorney must provide the defendant with reasonable notice of the State's intent to seek a mandatory minimum 50 year sentence (Hard 50). K.S.A. 21-6620(e)(1). The original trial jury or its alternate jurors shall serve in the Hard 50 proceeding. If the trial jury has been discharged prior to the Hard 50 proceeding, a new jury shall be impaneled. K.S.A. 21-6620(e)(2). A jury may only consider evidence of aggravating circumstances enumerated in K.S.A. 21-6624 or K.S.A. 21-4636 (prior to its repeal) which was made known to the defendant prior to the Hard 50 proceeding. K.S.A. 21-6620(e)(3). Only such evidence of mitigating circumstances subject to discovery pursuant to K.S.A. 22-3212 that the defendant has made known to the prosecuting attorney prior to the Hard 50 sentencing proceeding shall be admissible. K.S.A. 21-6620(e)(3). The burden of proof and weighing provisions are found in K.S.A. 21-6620(e)(5).

This instruction applies to all crimes committed on or after July 1, 1999 and prior to September 6, 2013, but does not apply to cases in which the defendant's conviction and sentence were final prior to June 17, 2013 unless the conviction or sentence was vacated in a collateral proceeding. K.S.A. 21-6620(d).

This instruction should be preceded by the applicable introductory and cautionary instructions as contained in PIK 4th 50.040, 50.050, and 50.070.

54.113

**PREMEDITATED MURDER IN THE FIRST DEGREE—
MANDATORY MINIMUM 50 YEAR SENTENCE—
AGGRAVATING CIRCUMSTANCES**

Aggravating circumstances are those that increase the enormity of the crime of premeditated murder in the first degree or add to its injurious consequences.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

- 1. [The defendant was previously convicted of a felony in which the defendant inflicted on another great bodily harm, disfigurement, dismemberment, or death.] and/or**
- 2. [The defendant knowingly or purposely killed or created a great risk of death to more than one person.] and/or**
- 3. [The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.] and/or**
- 4. [The defendant authorized or employed another person to commit the crime.] and/or**
- 5. [The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.] and/or**
- 6. [The defendant committed the crime while serving a sentence of imprisonment for conviction of a felony.] and/or**
- 7. [The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.] and/or**

8. [The defendant committed the crime in an especially heinous, atrocious, or cruel manner. As used in this instruction, the following definitions apply:

- "heinous" means extremely wicked or shockingly evil;
- "atrocious" means outrageously wicked and vile; and
- "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the sufferings of others.

Conduct which is heinous, atrocious, or cruel may include, but is not limited to:

- prior stalking of or criminal threats to the victim;
- preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious, or cruel;
- infliction of mental anguish or physical abuse before the victim's death;
- torture of the victim;
- continuous acts of violence begun before or continuing after the killing;
- desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or
- any other conduct you expressly find is especially heinous.

A finding that the victim was aware of the victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious, or cruel.]

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

Notes on Use

For authority, see K.S.A. 21-6624(a-h). If the State asserts aggravating circumstance number 1 above, and the trial judge finds that one or more of the defendant's prior convictions satisfy K.S.A. 21-6624(a), the jury shall be instructed that a certified journal entry of a prior conviction is presumed to prove the existence of the prior conviction beyond a reasonable doubt. K.S.A. 21-6620(b)(4).

The definitions of the terms "heinous," "atrocious" and "cruel" were approved by the Kansas Supreme Court in *State v. Kleypas*, 272 Kan. 894, 1029, 40 P.3d 139 (2001), which held that these definitions narrowed "the class of persons who are death eligible defendants in a manner which complies with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution."

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54.120

MURDER IN THE FIRST DEGREE—FELONY MURDER

The defendant is charged with murder in the first degree. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (or another) killed insert name.**
- 2. The killing was done while defendant was (committing) (attempting to commit) (fleeing from) insert inherently dangerous felony.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The elements of insert inherently dangerous felony are (listed in Instruction No. _____) (as follows: insert elements).

Notes on Use

For authority, see K.S.A. 21-5402(a)(2). Felony murder is an off-grid person felony.

K.S.A. 21-5402(c)(1) and (c)(2) list the "inherently dangerous felonies," categorized by their degree of relationship to the underlying homicide. The elements of the applicable underlying felony should be incorporated by reference to another instruction which lists them or the elements should be set forth in the concluding portion of this instruction.

When there is some evidence that a participant in the felony, other than the defendant, may actually have caused the victim's death, the parenthetical in the first paragraph may be used.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

There are no lesser included offenses to felony murder. See Comment below.

Comment

In *State v. McDaniel*, 306 Kan. 595, 395 P.3d 429 (2017), the Supreme Court held that jury instructions on felony murder, which permitted a guilty verdict only if the jury concluded victim was killed "while" defendant was committing aggravated robbery, did not require additional instructions stating that whether the murder occurred within the *res gestae* was a fact question for the jury. Under the given instruction, the jury was required to consider the possibility that the

murder had been completed prior to the robbery when determining whether the shooting occurred "while" defendant was committing aggravated robbery.

In *State v. Berry*, 292 Kan. 493, 254 P.3d 1276 (2011), the Supreme Court abrogated the rule in *State v. Foy*, 224 Kan. 558, 582 P.2d 281 (1978) that lesser included offense instructions be given only in certain circumstances. The court determined that lesser included offense instructions must be given in all felony-murder cases when supported by evidence. In apparent response to that Supreme Court decision, a Senate bill amended K.S.A. 21-5109(b)(1) in the 2012 session to state that "there are no lesser degrees of murder in the first degree under subsection (a)(2) of K.S.A. 2011 Supp. 21-5402, and amendments thereto" (felony murder). A House bill also amended K.S.A. 21-5109 but did not include the Senate changes to K.S.A. 21-5109(b)(1).

In the 2013 session, the Legislature resolved any conflict by adding a new subsection (d) to K.S.A. 21-5402, the first degree murder statute. The new subsection now specifically refers to K.S.A. 21-5109(b)(1), declaring that felony murder is "an alternative method of proving murder in the first degree," not a separate crime that is distinct from premeditated first degree murder, that felony murder is not a lesser included offense of either premeditated murder or capital murder, and that there are no lesser included offenses of felony murder. The Legislature further specified that it intended this amendment to "establish a procedural rule...construed and applied retroactively to all cases currently pending." The amendment was effective July 1, 2013.

In *State v. Todd*, 299 Kan. 263, ¶4, 323 P.3d 829 (2014), the Supreme Court held that: "The 2013 amendments made in K.S.A. 2013 Supp. 21-5402(d) and (e) eliminated lesser included offenses of felony murder and expressly provided for retroactive application to cases pending on appeal on and after its effective date. Retroactive application of the amendment does not violate the federal Ex Post Facto Clause"

In *State v. Brown*, 303 Kan. 995, 1003, 368 P.3d 1101 (2016), the Supreme Court held that the term "attempt" as found in K.S.A. 21-5402, felony murder, is intended to have a broader application than is found in the crime of attempt as set forth in K.S.A. 21-5301.

Adding "or another" to the first element in this instruction to adapt it to the facts as discussed in the Notes on Use "does not require the court to then also issue an aiding and abetting instruction specific to felony murder." To do so would be contrary to the nature of felony murder. *State v. Dupree*, 304 Kan. 377, 393, 373 P.3d 811 (2016).

Before July 1, 2011 Revisions to Criminal Code

Felony murder is not a lesser included offense of premeditated murder. *State v. McKinney*, 265 Kan. 104, 110, 961 P.2d 1 (1998).

A prosecution under this rule merely changes the type of proof necessary to support a conviction. Proof that the homicide was committed in the perpetration of a felony is tantamount to premeditation which otherwise would be necessary to constitute murder in the first degree. *State v. McCowan*, 226 Kan. 752, 759, 602 P.2d 1363 (1979).

To apply the felony-murder rule, it is only necessary to establish that the accused committed a felony inherently dangerous to human life and that the killing took place during the commission of the felony. Even an accidental killing is subject to this rule if the participant in the felony could reasonably foresee or expect that a life might be taken in the perpetration of the felony. *State v. Branch and Bussey*, 223 Kan. 381, 573 P.2d 1041 (1978); *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980).

When the murder is committed during the commission of a felony, the general rule is that no instructions on lesser included offenses should be given. The felonious conduct is held tantamount to the elements of premeditation in first-degree murder. But where the evidence of the underlying felony is inconclusive or reasonably in dispute, instructions must be given on lesser included offenses which are supported by the evidence. *State v. Foy*, 224 Kan. 558, 582 P.2d 281 (1978).

Cases defining which crimes are inherently dangerous to human life have been supplanted by K.S.A. 21-3436.

In a felony-murder case, evidence of the identity of the triggerman is irrelevant and all participants are principals. *State v. Myrick & Nelms*, 228 Kan. 406, 416, 616 P.2d 1066 (1980); *State v. Littlejohn*, 260 Kan. 821, 925 P.2d 839 (1996).

In *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994), the court ruled that Kansas does not recognize the crime of attempted felony murder.

In determining whether a killing occurs in the commission of the underlying felony, factors to be considered are time, distance, and the causal relationship between the underlying felony and the killing. *State v. Kaesontae*, 260 Kan. 386, 920 P.2d 959 (1996).

In *State v. Kleypas*, 272 Kan. 894, 938, 40 P.3d 139 (2001), the Supreme Court held "in the commission of," "attempt to commit," and "flight from," as used in K.S.A. 21-3401, are temporal requirements delineating when a killing may occur and still be part of the underlying felony.

This instruction was cited with approval in *State v. Lamae*, 268 Kan. 544, 998 P.2d 106 (2000); *State v. Beach*, 275 Kan. 603, 67 P.3d 121 (2003); *State v. Jackson*, 280 Kan. 541, 124 P.3d 460 (2005).

A felon may not be convicted of felony murder for the killing of his co-felon, caused not by his acts or actions but by the lawful acts of a law enforcement officer acting in self-defense in the course and scope of his duties in apprehending the co-felon, who was fleeing from an aggravated burglary in which both felons had participated. *State v. Sophophone*, 270 Kan. 703, 19 P.3d 70 (2001).

"Whether an underlying felony has been committed before commission of a felony murder is ordinarily a question of fact for the jury. The PIK Crim. 3d 56.02 jury instruction properly instructs the jury and fairly states the law on this issue." *State v. Bailey*, 292 Kan. 449, 255 P.3d 19, Syl. ¶3 (2011).

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54.130

**MURDER IN THE FIRST DEGREE—ALTERNATIVE
THEORIES—PREMEDITATED AND
FELONY MURDER**

The State has charged the defendant with one offense of murder in the first degree and has introduced evidence on two theories of proving this crime.

When evidence is presented on the two theories of proving the crime charged, you must consider both theories in arriving at your verdict.

In Instruction No. _____, the Court has set out the claims that must be proved by the State before you may find the defendant guilty of premeditated murder.

In Instruction No. _____, the Court has set out the claims that must be proved by the State before you may find the defendant guilty of the killing of a person while defendant was (committing) (attempting to commit) (fleeing from) insert inherently dangerous felony.

If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you should enter a verdict of guilty.

[If you have a reasonable doubt about the guilt of the defendant as to the crime of murder in the first degree on both theories, then you must enter a verdict of not guilty.]

OR

[If you have a reasonable doubt about the guilt of the defendant as to the crime of murder in the first degree on both theories, then consider whether the defendant is guilty of (murder in the second degree) (voluntary manslaughter) (involuntary manslaughter).]

Notes on Use

For authority, see K.S.A. 21-5402. This statute establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime. Where the information and evidence include both felony murder and premeditated murder, this instruction must be given in

addition to PIK 4th 54.110, Murder in the First Degree, and PIK 4th 54.120, Murder in the First Degree—Felony Murder.

Choice of the bracketed paragraphs depends on whether or not there are lesser included offenses. See PIK 4th 69.010, Murder in the First Degree with Lesser Included Offenses.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

Comment

Before July 1, 2011 Revisions to Criminal Code

The district court did not err in instructing the jury to simultaneously consider premeditated and felony murder and, upon finding *Stewart* guilty on either or both theories, to sign the verdict form, ending deliberations without consideration of any lesser included homicide offenses. *State v. Stewart*, 306 Kan. 237, 393 P.3d 1031 (2017).

While K.S.A. 21-3401 establishes but one offense of murder in the first degree, where the evidence supports both theories, one of premeditation and one of felony murder, that is a killing occurring during the commission of or an attempt to commit an inherently dangerous felony, the State may proceed on both theories. The defendant is entitled to notice that the State is proceeding under both theories in the filing of the information. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978); *State v. Wise*, 237 Kan. 117, 123, 697 P.2d 1295 (1985).

Generally, alternate theories would be utilized where the evidence may show that the underlying felony was planned but not a killing, and that the homicide took place during the commission or attempted commission of the felony. A finding by the jury that a killing was committed not with premeditation but actually in the commission of the felony would not be inconsistent. *State v. Wise*, 237 Kan. at 121 and 122. The State is not required to elect between the two theories as long as the defendant is fully apprised of the charges. *State v. Jackson*, 223 Kan. at 557.

State v. Hartfield, 245 Kan. 431, 447, 781 P.2d 1050 (1989), recommends that the elements of each alternative be in separate instructions, but since the instruction refers to "either or both theories" in the conclusion, no error was found.

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990), that "[w]hen an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilt by reason of the killer's malignant purpose." To the same effect, see *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); *State v. Thomas*, 302 Kan. 440, 440, 353 P.3d 1134 (2015) (statutory right to a unanimous verdict only applies to determination of guilt for the single crime charged; unanimity is not required as to the particular means by which the crime was committed so long as substantial evidence supports each alternative means upon which the jury is instructed).

Before the mandatory minimum 40 year sentence is imposed, however, the jury must have unanimously found that premeditated murder occurred. In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Court upheld the use of this instruction in a "Hard 40" case where separate verdict forms for premeditated murder and felony murder were used. See also *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998).

54.140

MURDER IN THE SECOND DEGREE

- A. The defendant is charged with murder in the second degree. The defendant pleads not guilty.**

OR

- B. If you do not agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.**

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally killed insert name.**

OR

- 1. The defendant killed insert name unintentionally but recklessly under circumstances that show extreme indifference to the value of human life.**

- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5403. Murder in the second degree is a severity level 1, person felony, if intentional. If unintentional, it is a severity level 2, person felony.

If the information charges murder in the second degree, omit paragraph B; but if the information charges murder in the first degree, omit paragraph A. See PIK 4th 68.080, Lesser Included Offenses, and PIK 4th 69.010, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.03.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

Comment

In *State v. Bernhardt*, 304 Kan. 460, 372 P.3d 1161 (2016), the court held that, although "[s]trictly speaking . . . reckless second-degree murder is not a lesser included offense of intentional second-degree murder," the trial court did not err by giving separate lesser included offense instructions. *Id.* at 475-476. The court commented "we have clearly stated that 'in the interests of promoting an orderly method of considering the possible verdicts, 'a trial court should instruct on lesser included offenses in the order of severity beginning with the offense with the most severe penalty.' [citations omitted]" *Id.*

In *State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018), the Supreme Court held a district court is not required to instruct a jury to consider a lesser included homicide offense simultaneously with any greater homicide offense. Overruling *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003), the court found the rule requiring simultaneous consideration of the lesser included offense of voluntary manslaughter contemporaneously with premeditated first-degree murder and intentional second-degree murder was confusing, unworkable, and without basis in statute or the Constitution. "The kind of sequential instructions contemplated by our pattern instructions eliminate the confusion and difficulty that will surely ensue when a jury is instructed to simultaneously consider first-degree murder and every lesser included offense at the same time." See also *State v. James*, 309 Kan. 1280, 443 P.3d 1063 (2019).

Before July 1, 2011 Revisions to Criminal Code

Intentional

Intentional second-degree murder requires proof of a specific intent to kill. *State v. Pope*, 23 Kan. App. 2d 69, 927 P.2d 503 (1996), *rev. denied* 261 Kan. 1086 (1997).

In rejecting the defendant's complaint to the words, "if you do not agree," when used to preface an instruction to a lesser charge, the court held the words are not coercive and no inference arises with the jury that an acquittal of the greater charge is required before considering the lesser. *State v. Roberson*, 272 Kan. 1143, 38 P.3d 715 (2002).

Where there is evidence of mitigating circumstances of sudden quarrel or heat of passion justifying an instruction on voluntary manslaughter in a case where voluntary manslaughter is a lesser included offense, the failure to instruct the jury to consider such circumstances, consistent with PIK 3d 56.05B, in its determination of whether the defendant is guilty of second-degree murder, is always error and in most cases presents a case of clear error. *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003).

Evidence of defendant's voluntary intoxication alone will not justify an instruction on reckless second-degree murder as a lesser offense of premeditated first-degree murder. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004); *State v. Cavaness*, 278 Kan. 469, 101 P.3d 717 (2004).

Unintentional

See Comment to PIK 3d 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

In *State v. Robinson*, 261 Kan. 865, 934 P.2d 38 (1997), the Supreme Court examined the difference between unintentional second-degree murder (depraved heart murder) and reckless involuntary manslaughter. Depraved heart second-degree murder requires a conscious disregard of the risk, sufficient under the circumstances to manifest extreme indifference to the value of human life. Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second-degree murder, and less extreme recklessness is punished as manslaughter. Although indifference to the value of human life in general is often present in crimes prosecuted as depraved heart murder, extreme indifference to the value of one specific human life is enough to satisfy the elements of depraved heart second-degree murder.

In *State v. Bailey*, 263 Kan. 685, 952 P.2d 1289 (1998), the Supreme Court affirmed a trial court's refusal to instruct the jury on reckless second-degree murder and reckless involuntary manslaughter as lesser included offenses of first-degree murder. The court reasoned that a defendant's actions in pointing a gun at an individual and pulling the trigger are intentional rather than reckless even if the defendant did not intend to kill the victim.

Where there is evidence of mitigating circumstances of sudden quarrel or heat of passion justifying an instruction on voluntary manslaughter in a case where voluntary manslaughter is a lesser included offense, the failure to instruct the jury to consider such circumstances, consistent with PIK Crim. 3d 56.05B, in its determination of whether the defendant is guilty of second-degree murder, is always error and in most cases presents a case of clear error. *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003), *overruled on other grounds in State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018).

54.150

HOMICIDE DEFINITIONS**(a) Intentionally or With Intent**

A defendant acts intentionally when it is the defendant's desire or conscious objective to insert one of the following:

- do the act complained about by the State.
- or
- cause the result complained about by the State.

For authority, see K.S.A. 21-5202(h).

(b) Knowingly or With Knowledge

A defendant acts knowingly when the defendant is aware insert one of the following:

- of the nature of (his) (her) conduct that the State complains about.
- or
- of the circumstances in which (he) (she) was acting.
- or
- that (his) (her) conduct was reasonably certain to cause the result complained about by the State.

For authority, see K.S.A. 21-5202(i).

(c) Recklessly or Reckless

A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk that insert one of the following:

- certain circumstances exist.
- or

- a result of the defendant's actions will follow.

This act by the defendant disregarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation.

For authority, see K.S.A. 21-5202(j).

(d) Premeditation

Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.

For authority, see *State v. Holmes*, 272 Kan. 491, 498-9, 33 P.3d 856 (2001).

54.160

UNINTENDED VICTIM—TRANSFERRED INTENT

When a homicidal act is directed against one other than the person killed, the responsibility of the actor is the same as it would have been had the act been completed against the intended victim.

Notes on Use

For authority, see *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967).

This instruction should be given in cases where there was an unintended victim, such as in cases of mistaken identity or where a bystander is killed. In *State v. Stringfield*, 4 Kan. App. 2d 559, 608 P.2d 1041, *rev. denied* 228 Kan. 807 (1980), the court applied the transferred intent rule to aggravated battery.

Comment

Before July 1, 2011 Revisions to Criminal Code

It is no defense to the crime of murder that the defendant may have mistaken the victim for some other person, or that he may have supposed himself wronged by some other person. The fact that the homicidal act was directed against a person other than the person killed does not relieve the slayer of criminal responsibility. *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967). Where a person intends to kill one person but actually kills another, he is just as responsible as if he had killed the person intended.

This principle rests on the basis of "transferred intent", and is equally applicable to prosecutions for assault and battery, notwithstanding proof of specific intent to injure is required. "The intent follows the bullet." 40 Am. Jur. 2d, Homicide § 11, pp.302-303. *State v. Stringfield*, 4 Kan. App. 2d 559, 608 P.2d 1041 (1980).

In *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996), the Supreme Court contrasted the transferred-intent rule and the felony-murder rule.

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54.170

VOLUNTARY MANSLAUGHTER

- A. The defendant is charged with voluntary manslaughter. The defendant pleads not guilty.**

OR

- B. If you do not agree that the defendant is guilty of insert appropriate murder charge, you should then consider the lesser included offense of voluntary manslaughter.**

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly killed insert name.**
- 2. It was done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [a place of work] [an occupied vehicle] [property]).**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

["Heat of passion" means any intense or vehement emotional excitement which was spontaneously provoked from circumstances. The emotional state of mind must be of such degree as would cause an ordinary person to act on impulse without reflection.]

Notes on Use

For authority, see K.S.A. 21-5404. Voluntary manslaughter is a severity level 3, person felony.

If the information charges voluntary manslaughter, omit paragraph B; but if the information charges a higher murder charge, omit paragraph A. See PIK 4th 68.080, Lesser Included Offenses, and PIK 4th 69.010, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes the crime applicable when the victim is an "unborn child."

Comment

In *State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018), the Supreme Court held a district court is not required to instruct a jury to consider a lesser included homicide offense simultaneously with any greater homicide offense. Overruling *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003), the court found the rule requiring simultaneous consideration of the lesser included offense of voluntary manslaughter contemporaneously with premeditated first-degree murder and intentional second-degree murder was confusing, unworkable, and without basis in statute or the Constitution. "The kind of sequential instructions contemplated by our pattern instructions eliminate the confusion and difficulty that will surely ensue when a jury is instructed to simultaneously consider first-degree murder and every lesser included offense at the same time." See also *State v. James*, 309 Kan. 1280, 443 P.3d 1063 (2019).

Before July 1, 2011 Revisions to Criminal Code

See *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977), on the duty of the trial judge to instruct on lesser included offenses in homicide cases.

"Heat of passion" is subject to an objective test. It requires an emotional state of mind of such degree as to cause an ordinary person to act on impulse without reflection. Moreover, the emotional state must arise from circumstances constituting "sufficient provocation." "Sufficient provocation" is also subject to an objective test. The provocation must be sufficient to cause an ordinary person to lose control of actions and reason. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

The unreasonable but honest belief required under K.S.A. 21-3403(b) must be based on the reality of the circumstances surrounding the killing and not on a psychotic delusion. *State v. Ordway*, 261 Kan. 776, 934 P.2d 94 (1997).

Where there is evidence of mitigating circumstances of sudden quarrel or heat of passion justifying an instruction on voluntary manslaughter in a case where voluntary manslaughter is a lesser included offense, the failure to instruct the jury to consider such circumstances, consistent with PIK Crim. 3d 56.05B, in its determination of whether the defendant is guilty of second-degree murder, is always error and in most cases presents a case of clear error. *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003), *overruled on other grounds in State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018).

The Kansas Supreme Court has consistently rejected the argument that imperfect self-defense applies to reduce premeditated first-degree murder to voluntary manslaughter. In *State v. Hurt*, 278 Kan. 676, 683, 101 P.3d 1249 (2004), premeditation and heat of passion were described as "mutually exclusive concepts." In *State v. Bell*, 280 Kan. 358, 121 P.3d 972 (2005), the defendant challenged PIK 3d 56.05-B because it did not allow the jury to consider the concept of imperfect self-defense for the purpose of reducing premeditated first-degree murder to voluntary manslaughter. The court declined to uphold this challenge. In *State v. Lawrence*, 281 Kan. 1081, 135 P.3d 1211 (2006), the defendant challenged 56.05-B because it did not allow the jury to consider imperfect self-defense contemporaneously with premeditation and because the ordering of the jury's deliberations did not allow the jury to reconcile those two concepts. Defendant augmented his argument with cases from other jurisdictions that hold that the only difference between murder and manslaughter is the presence or absence of malice. In rejecting this argument the court noted that in Kansas, the element of malice was eliminated from both first- and second-degree murder and reiterated its prior approval of both the ordering of the instructions and the language of 56.05-B.

54.180

INVOLUNTARY MANSLAUGHTER

A. The defendant is charged with involuntary manslaughter. The defendant pleads not guilty.

OR

B. If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.

To establish this charge, each of the following claims must be proved:

- 1. The defendant killed insert name.**
- 2. The killing was done (recklessly) (in the [commission of] [attempt to commit] [flight from] insert applicable offense) (during the commission of a lawful act in an unlawful manner).**
- [3. Insert name was less than 6 years old.]**
- 3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

[The elements of insert applicable offense are (listed in Instruction No. _____) (as follows: insert elements).]

Notes on Use

For authority, see K.S.A. 21-5405(a)(1), (2), and (4). For charges under K.S.A. 21-5405(a)(3) and (5), use PIK 4th 54.181, Involuntary Manslaughter—Driving Under the Influence. Involuntary manslaughter under K.S.A. 21-5405(a)(1), (2), and (4) is a severity level 5, person felony, except it is a severity level 3, person felony when the victim is less than 6 years old. K.S.A. 21-5405(a)(2) provides that a felony, other than an inherently dangerous felony as defined in K.S.A. 21-5402, or misdemeanor can serve as the basis for an involuntary manslaughter charge if the statute was enacted for the protection of human life or safety including K.S.A. 8-1566 (reckless driving) and K.S.A. 8-1568 (fleeing or eluding). When instructing on a charge based on K.S.A. 21-5405(a)(2), the elements of the underlying offense must be specified by one of the methods set forth in the bracketed paragraph above. See *State v. Rivera*, 48 Kan. App. 2d 417, 446-447, 291 P.3d 512 (2012).

If the information charges involuntary manslaughter, omit paragraph B; but if the information charges a higher murder charge, omit paragraph A. See PIK 4th 68.080, Lesser Included Offenses, and PIK 4th 69.010, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

Comment

Before July 1, 2011 Revisions to Criminal Code

The use of excessive force may be found to be an "unlawful manner" of committing the "lawful act" of self-defense, and thereby supply an element of involuntary manslaughter. *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). *State v. Warren*, 5 Kan. App. 2d 754, 624 P.2d 476, rev. denied 229 Kan. 671 (1981).

In *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995), the court ruled that Kansas does not recognize the crime of attempted involuntary manslaughter.

In *State v. Robinson*, 261 Kan. 865, 934 P.2d 38 (1997), the Supreme Court examined the difference between unintentional second degree murder (depraved heart murder) and reckless involuntary manslaughter. Depraved heart second degree murder requires a conscious disregard of the risk, sufficient under the circumstances to manifest extreme indifference to the value of human life. Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second degree murder, and less extreme recklessness is punished as manslaughter. Although indifference to the value of human life in general is often present in crimes prosecuted as depraved heart murder, extreme indifference to the value of one specific human life is enough to satisfy the elements of depraved heart second degree murder.

In *State v. McCullough*, 293 Kan. 970, 270 P.3d 1142 (2012), the court held that in reckless involuntary manslaughter, the proper focus is on whether the killing was intentional or unintentional, and not on whether the act leading to death was deliberate and voluntary. See also *State v. Deal*, 293 Kan. 872, 269 P.3d 1282 (2012).

In rejecting the defendant's complaint to the words, "if you do not agree," when used to preface an instruction to a lesser charge, the court held the words are not coercive and no inference arises with the jury that an acquittal of the greater charge is required before considering the lesser. *State v. Roberson*, 272 Kan. 1143, 38 P.3d 715 (2002).

54.181

**INVOLUNTARY MANSLAUGHTER—
DRIVING UNDER THE INFLUENCE**

The defendant is charged with involuntary manslaughter. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant killed insert name.
 2. The killing was done in the (commission of) (attempt to commit) (flight from) the offense of driving under the influence.
 - [3. At the time the defendant (committed) (attempted to commit) (fled from) the offense of driving under the influence, the defendant was in violation of a restriction imposed on the defendant's driving privileges by the division of motor vehicles for (failure of a [breath] [blood] [urine] test) (refusal to submit to a [breath] [blood] [urine] test).]
 - [3. At the time the defendant (committed) (attempted to commit) (fled from) the offense of driving under the influence, the defendant's driving privileges had been (suspended) (revoked) by the division of motor vehicles for (failure of a [breath] [blood] [urine] test) (refusal to submit to a [breath] [blood] [urine] test).]
 - [3. At the time the defendant (committed) (attempted to commit) (fled from) the offense of driving under the influence, the division of motor vehicles had determined the defendant was a habitual violator.
 4. One or more of the convictions leading to the division of motor vehicles' determination that the defendant was a habitual violator was for driving under the influence.]
3. or 4. or 5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[The elements of insert applicable offense are (listed in Instruction No. __) (as follows: insert elements).]

Notes on Use

For authority, see K.S.A. 21-5405(a)(3) and (5). Select the first or second bracketed Element No. 3 for a charge under subsection (a)(5)(A) or (B). Select the bracketed Element Nos. 3 and 4 for a charge under subsection (a)(5)(C). For charges under K.S.A. 21-5405(a)(1), (2), and (4), use PIK 4th 54.180, Involuntary Manslaughter.

Under K.S.A. 21-5405(a)(5)(A) and (B), the restriction, suspension, or revocation of driving privileges imposed by the division of motor vehicles for failure of, or refusal to take, the breath, blood, or urine test referred to in the first two alternatives for Element No. 3 of the instruction is limited to those imposed under article 10 of chapter 8 of the Kansas Statutes Annotated.

Comment

Before July 1, 2011 Revisions to Criminal Code

A conviction of the crime of involuntary manslaughter while driving under the influence of alcohol requires evidence that the conduct of the defendant was the cause of the victim's death. If causation is an issue in the case, the jury should be instructed: "The fault or lack of fault of [decedent] is a circumstance to be considered along with all the other evidence to determine whether the defendant's conduct was or was not the direct cause of [decedent's] death." *State v. Collins*, 36 Kan. App. 2d 367, 138 P.3d 1262 (2006).

"The legislature did not intend to create alternative means of committing involuntary manslaughter while driving under the influence of alcohol or drugs under K.S.A. 21-3442 by providing that the crime occurs when there is a killing of a human being 'in the commission of, or attempt to commit, or flight from' driving under the influence. Instead, the phrase 'in the commission of, or attempt to commit, or flight from' describes factual circumstances sufficient to establish a material element of the crime." *State v. Brammer*, 301 Kan. 333, 343 P.3d 75, Syl. ¶ 1 (2015).

54.190

VEHICULAR HOMICIDE

The defendant is charged with vehicular homicide. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant killed insert name by the operation of (an automobile) (an airplane) (a motorboat) (insert name of motor vehicle).**
- 2. The defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another.**
- 3. The defendant operated the vehicle in a manner which constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances.**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The term "material deviation" means conduct amounting to more than simple or ordinary negligence but not amounting to gross negligence.

Notes on Use

For authority, see K.S.A. 21-5406. Vehicular homicide is a class A, person misdemeanor.

Subject to the exception in the statute, K.S.A. 21-5419 make this crime applicable when the victim is an "unborn child."

Comment

Before July 1, 2011 Revisions to Criminal Code

The gravamen of the offense prior to the 1972 amendment was simple negligence. However, the Court in *State v. Gordon*, 219 Kan. 643, 654, 549 P.2d 886 (1976), held that legislative intent contemplated "something more than simple negligence."

Where the homicide is unintentional and caused by the operation of a motor vehicle, the statute is concurrent with and controls the general statute on involuntary manslaughter, K.S.A.

21-3404. But, where the charge is involuntary manslaughter and the issue is whether or not the conduct of the accused was wanton, vehicular homicide would be a lesser included offense of involuntary manslaughter and the jury should be instructed thereon. *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978); *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978).

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defendant's conduct was or was not the direct cause of decedent's death. The decedent's negligence may have been such a substantial factor in his death as to be itself the cause. *State v. Gordon*, supra.

In *State v. Boydston*, 4 Kan. App. 2d 540, 609 P.2d 224 (1980), the defendant requested an instruction that a material deviation lies between ordinary negligence and wanton conduct. The Court held it was not necessary to define a material deviation. Failure to yield the right of way, or to stop at a stop sign, or reckless driving are not lesser degrees of vehicular homicide as none of these offenses have elements which are necessary elements of this crime.

54.200

ASSISTING SUICIDE

The defendant is charged with assisting suicide. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly, by force or duress, caused insert name to (commit) (attempt to commit) suicide.

OR

1. The defendant intentionally assisted insert name to (commit) (attempt to commit) suicide by insert one of the following:
 - providing the physical means by which insert name (committed) (attempted to commit) suicide.
 - or
 - participating in a physical act by which insert name (committed) (attempted to commit) suicide.
2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5407. Assisting suicide knowingly by force or duress is a severity level 3, person felony, and as otherwise described is a severity level 9, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

PIK 3d 56.08 was cited with approval in *State v. Baker*, 281 Kan. 997, 135 P.3d 1098 (2006).

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54.201

**DISTRIBUTING A CONTROLLED SUBSTANCE
CAUSING GREAT BODILY HARM OR DEATH**

The defendant is charged with unlawfully distributing a controlled substance causing (great bodily harm) (death). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant distributed insert name of controlled substance.
2. The defendant did so intentionally, knowingly, or recklessly.
3. (Great bodily harm to) (The death of) insert name of user resulted from (his) (her) use of the insert name of controlled substance distributed by the defendant.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[It is not a defense that insert name of user contributed to (his) (her) own (great bodily harm) (death) by using the controlled substance or consenting to the administration of the controlled substance by another.]

"Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.

"Use" means injection, inhalation, ingestion, or other introduction into the body.

Notes on Use

For authority, see K.S.A. 21-5430(a) and (b). The statute refers to K.S.A. 21-5705 to define distributing a controlled substance. Controlled substance is defined in K.S.A. 21-5701. Distribution of a controlled substance causing great bodily harm is a nondrug severity level 5, person felony, and such distribution causing death is a severity level 1, person felony.

54.202

**DISTRIBUTING A CONTROLLED SUBSTANCE
ANALOG CAUSING GREAT BODILY HARM OR DEATH**

The defendant is charged with unlawfully distributing a controlled substance analog causing (great bodily harm) (death).

To establish this charge, each of the following claims must be proved:

1. The defendant distributed insert name of controlled substance analog.
2. The defendant did so intentionally, knowingly, or recklessly.
3. The insert name of controlled substance analog is intended for human consumption.
4. Insert one or more of the following:

- The chemical structure of insert name of analog is substantially similar to the chemical structure of insert name of controlled substance.

or

- Insert name of analog has a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to that of insert name of controlled substance.

or

- The defendant (represented) (intended) that insert name of analog (has) (have) a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to that of insert name of controlled substance.

5. (Great bodily harm to) (The death of) insert name of user resulted from (his) (her) use of the insert name of analog distributed by the defendant.
6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[It is not a defense that insert name of user contributed to (his) (her) own (great bodily harm) (death) by using the controlled substance or consenting to the administration of the controlled substance by another.]

"Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.

"Use" means injection, inhalation, ingestion, or other introduction into the body.

Notes on Use

For authority, see K.S.A. 21-5430(a) and (b). The name of the controlled substance to be inserted in the appropriate blanks in Element Nos. 3 and 4 must be a substance listed in or added to the schedules designated in K.S.A. 65-4105 or 65-4107. Distribution of a controlled substance analog causing great bodily harm is a nondrug severity level 5, person felony, and such distribution causing death is a severity level 1, person felony.

54.210

KIDNAPPING

The defendant is charged with kidnapping. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (took) (confined) insert name by (force) (threat) (deception).**
- 2. The defendant did so with the intent to hold insert name insert one or more of the following:**
 - for ransom or as a shield or hostage.**
 - or**
 - to facilitate flight or the commission of any crime.**
 - or**
 - to inflict bodily injury on or to terrorize insert name, or another.**
 - or**
 - to interfere with the performance of any governmental or political function.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5408. Kidnapping is a severity level 3, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

PIK 2d 56.24 was approved in *State v. Glymph*, 222 Kan. 73, 75, 563 P.2d 422 (1977); and in *State v. Nelson*, 223 Kan. 572, 575 P.2d 547 (1978). *State v. McKessor*, 246 Kan. 1, 11, 785 P.2d 1332 (1990).

The "taking or confinement" requires no particular distance or removal, nor any particular time or place of confinement. It is the taking or confinement that supplies the necessary element of kidnapping. The word "facilitate" means something more than just to make more convenient. "To facilitate" must have some significant bearing on making the commission of the crime easier. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

Where the defendant is charged with kidnapping by "deception," the State must prove that the taking or confinement was the result of the defendant knowingly and willfully making a false statement or representation, expressed or implied. *State v. Holt*, 223 Kan. 34, 574 P.2d 152 (1977).

54.220

AGGRAVATED KIDNAPPING

The defendant is charged with aggravated kidnapping. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (took) (confined) insert name by (force) (threat) (deception).
2. The defendant did so with the intent to hold insert name insert one of the following:
 - for ransom or as a shield or hostage.
or
 - to facilitate flight or the commission of any crime.
or
 - to inflict bodily injury on or to terrorize insert name, or another.
or
 - to interfere with the performance of any governmental or political function.
3. Bodily harm was inflicted upon insert name.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5408. Aggravated kidnapping is a severity level 1, person felony.

Kidnapping may be a lesser included offense. See PIK 4th 54.210.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Royal*, 234 Kan. 218, 222, 670 P.2d 1337 (1983), the Supreme Court, relying on California cases noted a definition of "bodily harm" to be "any touching of the victim against the victim's will; with physical force, in an intentional, hostile and aggravated manner, or the projecting of such force against the victim by the kidnaper not including trivial injuries likely to result from any forcible kidnapping by the very nature of the act." In *State v. Peltier*, 249 Kan. 415, 819 P.2d 628 (1991) the Supreme Court, relying on *State v. Royal*, stated that if there is an issue of fact as to whether bodily harm occurred, the jury instruction should include the definition of bodily harm.

Unnecessary acts of violence upon the victim, and those occurring after the initial abduction would constitute bodily harm. *State v. Mason*, 250 Kan. 393, 396, 827 P.2d 748 (1992).

Rape is an act of violence unnecessary to and not part of the kidnapping itself. *State v. Barry*, 216 Kan. 609, 533 P.2d 1308 (1974). Throwing a victim into a swollen stream was bodily harm. *State v. Taylor*, 217 Kan. 706, 538 P.2d 1375 (1975).

54.230

INTERFERENCE WITH PARENTAL CUSTODY

The defendant is charged with interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. Insert name of child was a child less than 16 years old.**
- 2. The defendant (took) (enticed) the child away.**
- 3. The defendant did so with the intent to detain or conceal the child from insert name, (its parent) (its guardian) (the person) having lawful charge of the child.**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

[It is not a defense that the defendant is a parent entitled to joint custody of the child.]

Notes on Use

For authority, see K.S.A. 21-5409. Interference with parental custody is a class A, person misdemeanor if the perpetrator is a parent entitled to joint custody of the child either on the basis of a court order or by virtue of the absence of a court order. In all other cases, it is a severity level 10, person felony.

54.240

AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY

The defendant is charged with aggravated interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was a child less than 16 years old.
2. The defendant (took) (enticed) the child away.
3. The defendant did so with the intent to detain or conceal the child from insert name, (its parent) (its guardian) (the person) having lawful charge of the child.
4. The defendant insert one of the following:
 - previously was convicted of interference with parental custody.
or
 - was hired to commit interference with parental custody.
or
 - took the child outside the state without the consent of either the person having custody or the court.
or
 - after lawfully taking the child outside the state while exercising visitation rights or parenting time, refused to return the child at the end of that time.
or
 - at the end of the exercise of any visitation rights or parenting time outside the state, refused to return or hindered the return of the child.
or
 - detained or concealed the child in an unknown place, whether inside or outside this state.

OR

2. **The defendant hired someone to (take) (entice) the child away.**
3. **The defendant did so with the intent to detain or conceal the child from insert name, (its parent) (its guardian) (the person) having lawful charge of the child.**
4. or 5. **This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5409(b). Aggravated interference with parental custody is a severity level 7, person felony.

54.250**CRIMINAL RESTRAINT**

The defendant is charged with criminal restraint. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly and without legal authority restrained insert name so as to interfere substantially with (his) (her) liberty.**
- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5411.

In cases where evidence has been introduced to support a merchant's defense the following paragraph should be added to the end of the instruction:

A merchant, or his/her agent or employee, who has probable cause to believe that a person (has actual possession of) (has wrongfully taken) (is about to wrongfully take) merchandise from his/her mercantile establishment, may detain such person (on the premises) (in the immediate vicinity thereof) in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession. Such reasonable detention does not constitute (an arrest) (criminal restraint).

Comment

Before July 1, 2011 Revisions to Criminal Code

PIK 3d 56.28 was cited with approval in *State v. Timms*, 29 Kan. App. 2d 770, 31 P.3d 323 (2001).

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54.260**ASSAULT**

The defendant is charged with assault. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly placed insert name in reasonable apprehension of immediate bodily harm.**
- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-5412. Assault is a class C person misdemeanor.

Comment

Before July 1, 2011 Revisions to Criminal Code

Apprehension is fear of harm to the person who is threatened, not fear of harm to a third person. *State v. Warbritton*, 215 Kan. 534, 527 P.2d 1050 (1974).

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54.270

ASSAULT OF A LAW ENFORCEMENT OFFICER

**The defendant is charged with assault of a law enforcement officer.
The defendant pleads not guilty.**

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly placed insert name in reasonable apprehension of immediate bodily harm.**
- 2. Insert name was a uniformed or properly identified ([state] [county] [city] [federal] law enforcement officer) ([university] [campus] police officer).**
- 3. Insert name was engaged in the performance of (his) (her) duty.**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-5412. Assault of a law enforcement officer is a class A, person misdemeanor. Assault as defined in K.S.A. 21-5412(a), which is a class C person misdemeanor is a lesser included offense and, where warranted by the evidence the instruction in PIK 4th 54.260, Assault, should be given.

Comment

Before July 1, 2011 Revisions to Criminal Code

Apprehension is fear of harm to the person who is threatened, not fear of harm to a third person. *State v. Warbritton*, 215 Kan. 534, 527 P.2d 1050 (1974).

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54.280

AGGRAVATED ASSAULT

The defendant is charged with aggravated assault. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly placed insert name in reasonable apprehension of immediate bodily harm.
2. The defendant did so (with a deadly weapon) (while disguised in any manner designed to conceal identity) (with intent to commit insert name of felony).
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

No bodily contact is necessary.

[A deadly weapon is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury. An object can be a deadly weapon if the user intended to convince a person that it is a deadly weapon and that person reasonably believed it to be a deadly weapon.]

[The elements of insert name of felony, are (set forth in Instruction No. _____) (as follows: insert elements).]

Notes on Use

For authority, see K.S.A. 21-5412(b). Aggravated assault is a severity level 7, person felony.

Assault as defined in K.S.A. 21-5412(a) is a lesser included offense and where warranted by the evidence the instruction in PIK 4th 54.260, Assault, should be given.

If the basis of the charge is the defendant's use of a deadly weapon, the first bracketed clause should be used. If the basis of the charge is the defendant's alleged intention to commit a felony, the elements of the felony should be referred to or set forth in the concluding portion of the instruction as in the second bracketed clause.

Comment

For the crime of aggravated assault, a subjective analysis is used to determine whether the assault was committed with a deadly weapon. *State v. Graham*, 27 Kan. App. 2d 603, 6 P.3d 928 (2000).

In *State v. Williams*, 308 Kan. 1439, 1455-56, 430 P.3d 448 (2018), the Supreme Court considered whether an aggravated assault jury instruction directed a factual finding in favor of the State. The instruction given added the words "a baseball bat" to the pattern jury instruction because the State had alleged the deadly weapon was a baseball bat. The court found this instruction was not erroneous because the instruction also included further language from the pattern jury instruction explaining the jury must find the bat was calculated or likely to produce death or serious injury in order to determine the bat was used as a deadly weapon. While finding no error, the court advised caution in constructing this type of instruction and suggested alternative language that might be used when the instruction delineates the type of weapon used.

Before July 1, 2011 Revisions to Criminal Code

In *State v. Nelson*, 224 Kan. 95, 577 P.2d 1178 (1978), it was error for the trial court to omit one of the elements necessary to establish aggravated assault with a deadly weapon. The predecessor to this instruction was cited as being correct.

54.290

AGGRAVATED ASSAULT OF A LAW ENFORCEMENT OFFICER

The defendant is charged with aggravated assault of a law enforcement officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly placed insert name in reasonable apprehension of immediate bodily harm.
2. Insert name was a uniformed or properly identified ([state] [county] [city] [federal] law enforcement officer) ([university] [campus] police officer).
3. Insert name was engaged in the performance of (his) (her) duty.
4. The defendant did so (with a deadly weapon) (while disguised in any manner designed to conceal identity) (with intent to commit insert name of felony).
5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

No bodily contact is necessary.

[The elements of insert name of felony, are (set forth in Instruction No. _____) (as follows: insert elements).]

Notes on Use

For authority, see K.S.A. 21-5412(d). Aggravated assault of a law enforcement officer is a severity level 6, person felony. Aggravated assault (PIK 4th 54.280), assault of a law enforcement officer (PIK 4th 54.270) and assault (PIK 4th 54.260) are lesser included offenses and, when warranted by the evidence, one or more of those instructions should be given.

If the basis of the charge is the defendant's alleged intention to commit a felony, the elements of the felony should be referred to or set forth in the concluding portion of the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

Proof of actual knowledge that the person assaulted was a law enforcement officer is not necessary where it is undisputed that the officer was in uniform or properly identified as an officer. *State v. Farris*, 218 Kan. 136, 542 P.2d 725 (1975). This is distinguishable where the officer is not in uniform and the question of knowledge was raised in deciding what was required to establish that the officer had properly identified himself. *State v. Bradley*, 215 Kan. 642, 527 P.2d 988 (1974).

54.300

BATTERY

The defendant is charged with battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (recklessly) caused bodily harm to insert name.

OR

1. The defendant knowingly caused physical contact with insert name in a rude, insulting or angry manner.
2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5413. Battery is a class B, person misdemeanor.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

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54.310

AGGRAVATED BATTERY

The defendant is charged with aggravated battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly caused (great bodily harm to) (disfigurement of) insert name.

OR

1. The defendant knowingly caused bodily harm to insert name (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted).

OR

1. The defendant knowingly caused physical contact with insert name in a rude, insulting or angry manner (with a deadly weapon) (and in any manner whereby great bodily harm, disfigurement or death can be inflicted).

OR

1. The defendant recklessly caused (great bodily harm to) (disfigurement of) insert name.

OR

1. The defendant recklessly caused bodily harm to insert name (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted).

OR

1. The defendant drove under the influence resulting in bodily harm to insert name, under circumstances by which great bodily harm, disfigurement, or death can result from that act.

OR

1. The defendant drove under the influence resulting in (great bodily harm to) (disfigurement of) insert name.

- [2. At the time the defendant drove under the influence, the defendant was in violation of a restriction imposed on the defendant's driving privileges by the division of motor vehicles for (failure of a [breath] [blood] [urine] test) (refusal to submit to a [breath] [blood] [urine] test).

OR

2. At the time the defendant drove under the influence, the defendant's driving privileges had been (suspended) (revoked) by the division of motor vehicles for (failure of a [breath] [blood] [urine] test) (refusal to submit to a [breath] [blood] [urine] test).

OR

2. At the time the defendant drove under the influence, the division of motor vehicles had determined the defendant was a habitual violator.
3. One or more of the convictions leading to the division of motor vehicles' determination that the defendant was a habitual violator was for driving under the influence.]

2. or 3. or 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[A "deadly weapon" is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury.]

[The elements of driving under the influence are (listed in Instruction No. _____) (as follows: insert elements).]

Notes on Use

For authority, see K.S.A. 21-5413(b). The severity level for aggravated battery varies from a severity level 4, person felony to a severity level 8, person felony according to the circumstances of the crime. Battery as described in K.S.A. 21-5413(a) is a lesser included offense and where warranted by the evidence, PIK 4th 54.300, Battery, should be given.

Subject to the exceptions in the statute, K.S.A. 21-5419 makes this crime applicable when the victim is an "unborn child."

Comment

Domestic battery as provided in K.S.A. 21-5414(a)(1) is not a lesser included offense of aggravated battery as provided in K.S.A. 21-5413(b)(1)(A). *State v. Carter*, 54 Kan. App. 2d 34, 395 P.3d 458 (2017) *rev. denied* 307 Kan. 989 (2017).

Before July 1, 2011 Revisions to Criminal Code

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).

In *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989), the Court held the definition of "deadly weapon" for purposes of the aggravated battery statute is an instrument which, from the manner it is used, is calculated or likely to produce death or serious bodily injury. The determination of whether the object was a deadly weapon is made on an objective basis rather than subjectively from the victim's point of view. Ordinarily, whether a gun used as a club is a deadly weapon for purposes of the aggravated battery statute is a jury question. Thus, in *Colbert*, it was error to instruct the jury that "a firearm is a deadly weapon as a matter of law" in connection with a charge of aggravated battery.

Aggravated battery under K.S.A. 21-3414(a)(1)(C), intentionally causing physical contact with another person, incorporates the general intent required by K.S.A. 21-3201. Aggravated battery under this subsection is not a specific intent crime. *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123, *rev. denied* 260 Kan. 997 (1996).

The Supreme Court has frequently indicated the difference between bodily harm and great bodily harm. Bodily harm has been defined as any touching of the victim against the victim's will, with physical force, in an intentional hostile and aggravated manner. The word "great" distinguishes the bodily harm necessary to prove aggravated battery from slight, trivial, minor or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery. See *State v. Whitaker*, 260 Kan. 85, 917 P.2d 859 (1996).

In *State v. Cooper*, 303 Kan. 764, 366 P.3d 232 (2016), the court specifically "disapproved as an erroneous statement of law" a previous comment to this instruction that a "through and through" bullet wound is great bodily harm as a matter of law, noting that "[o]rdinarily, whether a victim has suffered great bodily harm is a question of fact for the jury to decide."

The fact that the defendant and his victim are married does not change the standards for probable cause to bind the defendant over on a charge of aggravated battery. *State v. Whittington*, 260 Kan. 873, 926 P.2d 237 (1996).

In *State v. Charles*, 304 Kan. 158, 372 P.3d 1109 (2016), the state charged the defendant committed intentional aggravated battery with a vehicle as a deadly weapon. As a lesser included offense, the district judge instructed not only on reckless aggravated battery "with a deadly weapon, to wit: a car," but also "in any manner whereby great bodily harm, disfigurement or death can be inflicted." The court held "[t]he district judge erred by expanding the lesser included instruction so that Charles could be convicted if the jury found beyond a reasonable doubt that he inflicted bodily harm on McDowell 'in any manner whereby great bodily harm, disfigurement or death can be inflicted.'" *Id.* at 168-169.

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54.311**PARENTAL DISCIPLINE DEFENSE TO BATTERY
OR AGGRAVATED BATTERY**

The defendant raises parental discipline as a defense.

It is a defense to the charge of (battery) (aggravated battery) if a parent's use of physical force upon a child was reasonable and appropriate, and with the purpose of safeguarding the child's welfare or maintaining discipline.

Notes on Use

The defense of parental discipline is not grounded in statute, but rather derives from the common law. See Comment below. PIK 4th 51.050, Defenses—Burden of Proof, should be given in conjunction with this instruction.

Comment

In *State v. Wade*, 45 Kan. App. 2d 128, 139, 245 P.3d 1038 (2010), *rev. denied* 292 Kan. 968 (2011), the Court of Appeals expressly recognized "parental discipline" as an affirmative defense in a case in which a parent is charged with battery of the parent's child and sufficient evidence is presented in support of the defense. In such a case, the trial court has a duty to instruct on the defense. This common law defense has its origin in *State v. Severns*, 158 Kan. 453, 459, 148 P.2d 488 (1944).

More recently in *State v. White*, 55 Kan. App. 2d 196, 410 P.3d 153 (2017), the Court of Appeals acknowledged the existence of "parental discipline" as an affirmative defense in a parent/child battery case but narrowed its application to a case involving use of physical force, not other forms of discipline.

54.320

**BATTERY AGAINST A LAW ENFORCEMENT OFFICER
OR COURT OFFICIAL**

The defendant is charged with battery against a insert applicable category of victim from K.S.A. 21-5413(c). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant insert one of the following:
 - (knowingly) (recklessly) caused bodily harm to insert name.
 - or
 - knowingly caused physical contact with insert name in a rude, insulting or angry manner.
2. Insert name was a (uniformed or properly identified [state] [county] [city] [federal] law enforcement officer) (uniformed or properly identified [university] [campus] police officer) (judge) (attorney) (community corrections officer) (court services officer).
3. Insert name was engaged in the performance of (his) (her) duty.

OR

1. The defendant insert one of the following:
 - (knowingly) (recklessly) caused bodily harm to insert name.
 - or
 - knowingly caused physical contact with insert name in a rude, insulting or angry manner.
2. The defendant was (in the custody of the secretary of corrections) (confined in a [juvenile correctional facility] [juvenile detention facility]) (confined in a [city holding facility] [county jail facility]).

3. Insert name was a (state correctional [officer] [employee]) (juvenile detention facility [officer] [employee]) (city correctional [officer] [employee]) (county correctional [officer] [employee]).
4. Insert name was engaged in the performance of (his) (her) duty.

4. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5413(c). Battery against a law enforcement officer ranges from a severity level 5, person felony to a class A person misdemeanor.

K.S.A. 21-5413(h) defines institutions, facilities, officers, employees, judges, and attorneys as those terms are used in that section.

54.330

**AGGRAVATED BATTERY AGAINST A LAW
ENFORCEMENT OFFICER OR COURT OFFICIAL**

The defendant is charged with aggravated battery against a insert applicable category of victim from K.S.A. 21-2513(d). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly caused (great bodily harm to) (disfigurement of) insert name.

OR

1. The defendant knowingly caused bodily harm to insert name (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted).

OR

1. The defendant knowingly caused physical contact with insert name in a rude, insulting, or angry manner (with a deadly weapon) (and in any manner whereby great bodily harm, disfigurement, or death can be inflicted).

2. Insert name was a (uniformed or properly identified [state] [county] [city] [federal] law enforcement officer) (uniformed or properly identified [university] [campus] police officer) (judge) (attorney) (community corrections officer) (court services officer).

OR

1. The defendant knowingly caused bodily harm to insert name with a motor vehicle.
2. Insert name was a uniformed or properly identified ([state] [county] [city] [federal] law enforcement officer) ([university] [campus] police officer).

3. Insert name was engaged in the performance of (his) (her) duty.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[A "deadly weapon" is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury.]

Notes on Use

For authority, see K.S.A. 21-5413(d). Battery against a law enforcement officer as defined in K.S.A. 21-5413(c) and Battery, as defined in K.S.A. 21-5413(a) are lesser included offenses and when warranted by the evidence, PIK 4th 54.320, Battery Against A Law Enforcement Officer or Court Official, and PIK 4th 54.300, Battery, should be given.

If there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his or her duty the aggravated battery instruction, PIK 4th 54.310, should be considered as a lesser included offense.

Aggravated battery against a law enforcement officer as defined in K.S.A. 21-5413(d)(1) or (d)(3) is a severity level 3, person felony. As defined in subsection (d)(2) it is a severity level 4, person felony.

K.S.A. 21-5413(h) defines institutions, facilities, officers, employees, judges, and attorneys as those terms are used in that section.

Comment

Before July 1, 2011 Revisions to Criminal Code

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).

54.340

BATTERY AGAINST A SCHOOL EMPLOYEE

The defendant is charged with battery against a school employee. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (recklessly) caused bodily harm to insert name.

OR

1. The defendant knowingly caused physical contact with insert name in a rude, insulting or angry manner.
2. Insert name was a school employee.
3. Insert name was ([in][on] any school property or grounds upon which is located a building or structure used by a [unified school district] [an accredited nonpublic school] for student [instruction] [attendance] [extracurricular activities] of pupils enrolled in kindergarten or any of the grades 1 through 12) (at any regularly scheduled school sponsored activity or event).
4. Insert name was engaged in the performance of such employee's duty.
5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"School employee" means any employee of a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 through 12.

Notes on Use

For authority, see K.S.A. 21-5413(e). Battery against a school employee is a class A, person misdemeanor.

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54.350

BATTERY AGAINST A MENTAL HEALTH EMPLOYEE

The defendant is charged with battery against a mental health employee.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (recklessly) caused bodily harm to insert name.

OR

1. The defendant knowingly caused physical contact with insert name in a rude, insulting or angry manner.
2. The defendant was in the custody of the Secretary for Aging and Disability Services.

3. Insert name was [(an employee of the Department for Aging and Disability Services working at) (a contractor or employee of a contractor providing services to the Department for Aging and Disability Services at)] (Larned State Hospital) (Osawatomie State Hospital) (Kansas Neurological Institute) (Parsons State Hospital and Training Center).

OR

3. Insert name was a person employed by (the Department for Aging and Disability Services) (a firm or agency that contracted with the Department for Aging and Disability Services) to provide (treatment) (supervision) (services) at the sexually violent predator facility.
4. Insert name was engaged in the performance of (his) (her) duty.
5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5413(f). Battery against a mental health employee is a severity level 7, person felony.

54.360

DOMESTIC BATTERY

The defendant is charged with domestic battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (recklessly) caused bodily harm to insert name.

OR

1. The defendant knowingly caused physical contact with insert name in a rude, insulting or angry manner.
2. The defendant and insert name were family or household members.

OR

2. Insert name is a person with whom the defendant (was) (had been) involved in a dating relationship.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

["Family or household member" means persons 18 years of age or older who are spouses, former spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or who have lived together at any time. "Family or household member" also includes a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time.]

["Dating relationship" means a social relationship of a romantic nature. You may consider the following when making a determination whether a dating relationship existed: Nature of the relationship, length of time the relationship existed, frequency of interaction between the parties and the time since the termination of the relationship, if applicable.]

Notes on Use

For authority, see K.S.A. 21-5414. For the graduated penalties, see K.S.A. 21-5414(c)(1).

Comment

Domestic battery as provided in K.S.A. 21-5414(a)(1) is not a lesser included offense of aggravated battery as provided in K.S.A. 21-5413(b)(1)(A). *State v. Carter*, 54 Kan. App. 2d 34, 395 P.3d 458 (2017) *rev. denied* 307 Kan. 989 (2017).

54.361

AGGRAVATED DOMESTIC BATTERY

The defendant is charged with aggravated domestic battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly impeded the normal breathing or circulation of the blood of insert name by applying pressure on (his) (her) throat, neck or chest.

OR

1. The defendant knowingly impeded the normal breathing or circulation of the blood of insert name by blocking (his) (her) nose or mouth.
2. The defendant committed this act in a rude, insulting, or angry manner.
3. The defendant and insert name were family or household members.

OR

3. Insert name is a person with whom the defendant (was) (had been) involved in a dating relationship.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

["Family or household member" means persons 18 years of age or older who are spouses, former spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or who have lived together at any time. "Family or household member" also includes a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time.]

["Dating relationship" means a social relationship of a romantic nature. You may consider the following when making a determination whether a dating relationship existed: Nature of the relationship, length of time the relationship existed, frequency of interaction between the parties and the time since the termination of the relationship, if applicable.]

Notes on Use

For authority, see K.S.A. 21-5414(b). Aggravated domestic battery is a severity level 7, person felony.

54.370

CRIMINAL THREAT/AGGRAVATED CRIMINAL THREAT

The defendant is charged with criminal threat. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant threatened to insert one of the following:
 - commit violence and communicated the threat with the intent to (place another in fear) (cause the [evacuation] [lockdown] [disruption in regular ongoing activities] of any [building] [place of assembly] [facility of transportation]).
 - or
 - (adulterate) (contaminate) any (food) (raw agricultural commodity) (beverage) (drug) (animal feed) (plant) (public water supply).
 - or
 - expose any animal in this state to (contagious) (infectious) disease.
- [2. A ([public] [commercial] [industrial] building) (place of assembly) (facility of transportation) was evacuated as a result of the threat.]
2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

The term "threat" includes any statement made by the defendant that (he) (she) has already committed that act.

Notes on Use

For authority, see K.S.A. 21-5415. Criminal threat is a severity level 9, person felony. Aggravated criminal threat is a severity level 5, person felony.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

The reckless criminal threat provision of K.S.A. 21-5415(a)(1) has been deleted from this instruction because the Kansas Supreme Court in *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019), held that the portion of the statute allowing for a conviction if a threat of violence is made in reckless disregard for causing fear causes the statute to be unconstitutionally overbroad because it can apply to statements made without the intent to cause fear of violence.

54.380

MISTREATMENT OF A CONFINED PERSON

The defendant is charged with mistreatment of a confined person. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant was (a law enforcement officer) (a person in charge of or employed by the owner or operator of a correctional institution).
2. The defendant knowingly (abused) (neglected) (ill-treated) insert name.
3. Insert name was detained or confined.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5416. Mistreatment of a confined person is a class A, person misdemeanor.

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54.390

**MISTREATMENT OF DEPENDENT ADULT
OR ELDER PERSON—PHYSICAL**

The defendant is charged with mistreatment of (a dependent adult) (an elder person). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly inflicted (physical injury) (unreasonable confinement) (unreasonable punishment) upon insert name.**
- 2. Insert name was (a dependent adult) (an elder person).**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

[As used in this instruction "dependent adult" means a person 18 or more years old who is unable to protect (his) (her) own interest. [This includes a person who is (a) (an) insert applicable statutory circumstance from nonexclusive list at K.S.A. 21-5417(e)(2)(A)–(F).]]

[As used in this instruction "elder person" means a person 60 years of age or older.]

Notes on Use

For authority, see K.S.A. 21-5417. Mistreatment of a dependent adult or elder person as defined in K.S.A. 21-5417(a)(1) is a severity level 5, person felony.

The statute contains a nonexclusive list of people who are dependent adults. If there is evidence that the victim is a person described in K.S.A. 21-5417(e)(2)(A)–(F), the bracketed part of the definition of "dependent adult" should be added, specifying the applicable statutory circumstance.

If supported by evidence, the following paragraph from K.S.A. 21-5417(d) should be included in the instruction:

"No (dependent adult) (elder person) is considered to be mistreated for the sole reason that the (dependent adult) (elder person) relies upon or is being furnished treatment by spiritual means through prayer in lieu of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination of which the (dependent adult) (elder person) is a member or adherent."

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54.391

**MISTREATMENT OF DEPENDENT ADULT
OR ELDER PERSON—FINANCIAL**

The defendant is charged with mistreatment of (a dependent adult) (an elder person). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly took the (personal property) (financial resources) of insert name by taking (control) (title) (use) (management) of insert description of personal property or financial resources.
2. The defendant acted for the benefit of (the defendant) (another person).
3. The defendant took the (personal property) (financial resources) insert one of the following:
 - through (undue influence) (coercion) (harassment) (duress) (deception) (false representation) (false pretense).
 - or
 - without adequate consideration to insert name.
 - or
 - through insert act or acts alleged to violate the Kansas power of attorney act or the Kansas uniform trust code.
 - or
 - through insert act or acts alleged to violate the Kansas act for obtaining a guardian or conservator or both.
4. The total value of the (personal property) (financial resources) taken was at least insert value alleged to have been taken.
5. Insert name was (a dependent adult) (an elder person).
6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[As used in this instruction "dependent adult" means a person 18 or more years old who is unable to protect (his) (her) own interest. [This includes a person who is (a) (an) insert applicable statutory circumstance from nonexclusive list at K.S.A. 21-5417(e)(2)(A)–(F).]]

[As used in this instruction "elder person" means a person 60 years of age or older.]

["Adequate consideration" means the personal property or financial resources were given to insert name as payment for bona fide goods or services provided by insert name and the payment was at a rate customary for similar goods or services in the community where the (dependent adult) (elder person) resided at the time of the transaction.]

Notes on Use

For authority, see K.S.A. 21-5417(a)(2). Mistreatment of a dependent adult or elder person as defined in K.S.A. 21-5417(a)(2) ranges from a severity level 2, person felony to a class A, person misdemeanor, depending on the aggregate value of the property or services taken and, under subsection(b)(2)(G), prior convictions of this crime. The value applicable to the severity level charged should be included in Element No. 4 and, if the evidence of value warrants, the court may need to consider instructing on lesser included offenses.

The statute contains a nonexclusive list of people who are dependent adults. If there is evidence that the victim is a person described in K.S.A. 21-5417(e)(2)(A)-(F), the bracketed part of the definition of "dependent adult" should be added, specifying the applicable statutory circumstance.

When a defendant is charged with taking personal property or financial resources without adequate consideration, the bracketed definition of "adequate consideration" should be included.

K.S.A. 21-5417(c) recognizes four affirmative defenses to the charge of mistreatment of a dependent adult or an elder person by taking personal property or financial resources.

54.392

**MISTREATMENT OF DEPENDENT ADULT OR
ELDER PERSON—OMISSION OR DEPRIVATION**

The defendant is charged with mistreatment of (a dependent adult) (an elder person). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly omitted (treatment) (goods) (services) necessary to maintain (physical) (mental) health of insert name.

OR

1. The defendant knowingly deprived insert name of (treatment) (goods) (services) necessary to maintain [(his) (her)] (physical) (mental) health.
2. Insert name was (a dependent adult) (an elder person).
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[As used in this instruction "dependent adult" means a person 18 or more years old who is unable to protect (his) (her) own interest. [This includes a person who is (a) (an) insert applicable statutory circumstance from nonexclusive list at K.S.A. 21-5417(e)(2)(A)–(F).]]

[As used in this instruction "elder person" means a person 60 years of age or older.]

Notes on Use

For authority, see K.S.A. 21-5417(a)(3). Mistreatment of a dependent adult or elder person as defined in K.S.A. 21-5417(a)(3) is a severity level 8, person felony.

The statute contains a nonexclusive list of people who are dependent adults. If there is evidence that the victim is a person described in K.S.A. 21-5417(e)(2)(A)–(F), the bracketed part of the definition of "dependent adult" should be added, specifying the applicable statutory circumstance.

If supported by evidence, the following paragraph from K.S.A. 21-5417(d) should be included in the instruction:

"No (dependent adult) (elder person) is considered to be mistreated for the sole reason that the (dependent adult) (elder person) relies upon or is being furnished treatment by spiritual means through prayer in lieu of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination of which the (dependent adult) (elder person) is a member or adherent."

54.395

MISTREATMENT OF AN ELDER PERSON—FINANCIAL

This instruction has been deleted because mistreatment of an elder person has been combined with mistreatment of a dependent adult in PIK 4th 54.390, 54.391 and 54.392.

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54.396

**MISTREATMENT OF AN ELDER PERSON—
OMISSION OR DEPRIVATION**

This instruction has been deleted because mistreatment of an elder person has been combined with mistreatment of a dependent adult in PIK 4th 54.390, 54.391 and 54.392.

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54.400

ROBBERY

The defendant is charged with robbery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly took property from the (person) (presence) of insert name.**
- 2. The taking was by (threat of bodily harm to insert name) (force).**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5420. Robbery is a severity level 5, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973), the Court, in granting a new trial, relied on the failure of the trial court to include felonious intent, "one of the necessary elements of robbery." In tracing the history of robbery, the Court noted three ingredients as essential: the use of force and violence, the taking from a person of another money or other personal property, and an intent to rob or steal. (Modified in *State v. Lucas*, *infra*.)

In *State v. Rueckert*, 221 Kan. 727, 561 P.2d 850 (1977), the Court stated that specific intent is not an element of the crime of aggravated robbery, (therefore) voluntary intoxication would not be a defense to a general intent crime, although it may be used to demonstrate the inability to form a particular state of mind necessary for a specific intent crime. *State v. Rueckert* at 732-733.

State v. McDaniel & Owens, 228 Kan. 172, 612 P.2d 1231 (1980), holds that aggravated robbery is not a specific intent crime; it requires only general criminal intent. See also *State v. Knoxsah*, 229 Kan. 36, 622 P.2d 140 (1981). The Committee is of the opinion that alleging an "intention to take property" should suffice for establishing criminal intent under K.S.A. 21-3201.

In *State v. Lucas*, 221 Kan. 88, 557 P.2d 1296 (1976), the trial court failed to instruct on the intent requirement. In refusing to hold error, the Court found that the defendant's use of a deadly weapon established clear proof of intent.

The ownership of property taken is not an element of robbery; thus, failure to allege ownership is not defective. The State is not required to allege that the property taken was not that of the defendant. Therefore, the Committee has revised the above instruction to exclude "of another." See *State v. Lucas*, supra.

Presence means a possession or control so immediate that violence or intimidation is essential to sever it. "A thing is in the presence of a person with respect to robbery, which is so within his control that he could, if not overcome by violence or prevented by fear, retain his possession of it." *State v. Glymph*, 222 Kan. 73, 563 P.2d 422 (1977).

Theft is a lesser included crime of robbery as a "lesser degree of the same crime" under K.S.A. 21-3107(2). *State v. Long*, 234 Kan. 580, 675 P.2d 832 (1984).

In *State v. Montgomery*, 26 Kan. App. 2d 346, 988 P.2d 258 (1999), the Court of Appeals held that, limited to the facts of the case, the taking of the victim's glasses was incidental to the crime of attempted rape and had no significance independent of that crime; therefore, the taking of the glasses was insufficient to support defendant's conviction of aggravated robbery.

The definitions of bodily harm used in aggravated kidnapping cases are appropriate for use in differentiating between aggravated robbery and robbery. Some trivial injuries can happen in the course of a robbery, but bodily harm that leaves permanent scarring or unnecessary acts of violence committed upon a victim transform the robbery into aggravated robbery. *State v. Bryant*, 22 Kan. App. 2d 732, 922 P.2d 1118 (1996).

54.410

AGGRAVATED ROBBERY

The defendant is charged with aggravated robbery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly took property from the (person) (presence) of insert name.
2. The taking was by (threat of bodily harm to insert name) (force).
3. The defendant (was armed with a dangerous weapon) (inflicted bodily harm on any person in the course of such conduct).
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[A dangerous weapon is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury. An object can be a dangerous weapon if the user intended to convince a person that it is a dangerous weapon and that person reasonably believed it to be a dangerous weapon.]

Notes on Use

For authority, see K.S.A. 21-5420(b). Aggravated robbery is a severity level 3, person felony.

Robbery is a lesser included offense and, if warranted by the evidence, PIK 4th 54.400, Robbery, should be given.

If there is a question as to whether the defendant was armed with a dangerous weapon the bracketed definition should be used. *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Mitchell*, 234 Kan. 185, 190, 672 P.2d 1 (1983), the Court approved the use of "deadly weapon" as being synonymous with the statutory use of "dangerous weapon." See also, *State v. Davis*, 227 Kan. 174, 605 P.2d 572 (1980).

The definitions of bodily harm used in aggravated kidnapping cases are appropriate for use in differentiating between aggravated robbery and robbery. Some trivial injuries can happen in the course of a robbery, but bodily harm that leaves permanent scarring or unnecessary acts of violence committed upon a victim transform the robbery into aggravated robbery. *State v. Bryant*, 22 Kan. App. 2d 732, 922 P.2d 1118 (1996).

In *State v. Montgomery*, 26 Kan. App. 2d 346, 988 P.2d 258 (1999), the Court of Appeals held that, limited to the facts of the case, the taking of the victim's glasses was incidental to the crime of attempted rape and had no significance independent of that crime; therefore, the taking of the glasses was insufficient to support defendant's conviction of aggravated robbery.

When there is an issue as to whether the defendant was armed with a dangerous weapon, it is "error not to include the recommended PIK definition for a dangerous weapon." *State v. Robbins*, 272 Kan. 158, 32 P.3d 171 (2001).

54.420

TERRORISM

The defendant is charged with terrorism. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (committed) (attempted to commit) (conspired to commit) (criminally solicited the commission of) the crime of insert felony.**
- 2. The defendant did so with the intent to insert one of the following:**
 - (intimidate) (coerce) the civilian population.**
 - or**
 - influence government policy by (intimidation) (coercion).**
 - or**
 - affect the operation of any unit of government.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

The elements of insert the appropriate felony violation are (set forth in Instruction No. ____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-5421. Terrorism is an off-grid, person felony. K.S.A. 21-5421(c) provides that both an attempted act of terrorism and a conspiracy to commit terrorism are off-grid person felonies. The elements of the felony that defendant is alleged to have committed must be set out at the conclusion of the instruction, or if the defendant is charged with that felony in another count, the jury may be referred to that instruction for the elements of the felony. If the underlying felony is attempt or conspiracy, the trial court should also instruct the jury on the elements of attempt or conspiracy.

The sentence reduction provisions in K.S.A. 21-5301(c) do not apply to a conviction for terrorism, even if the defendant was charged with and convicted of attempting to commit an act of terrorism. K.S.A. 21-5421.

54.430

EXPOSING ANOTHER TO A LIFE THREATENING COMMUNICABLE DISEASE

The defendant is charged with exposing another to a life threatening communicable disease. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knew (he) (she) was infected with insert disease.
2. Insert disease is a life threatening communicable disease.
3. The defendant knew insert disease is a life threatening communicable disease.
4. The defendant insert one of the following:
 - engaged in (sexual intercourse) (sodomy) with insert name.
or
 - (sold) (donated) defendant's (blood) (blood products) (semen) (tissue) (organs) (other body fluids).
or
 - shared with insert name a (hypodermic needle) (syringe) (hypodermic needle and syringe) for the introduction of drugs or other substance into insert name's body.
or
 - shared with insert name a (hypodermic needle) (syringe) (hypodermic needle and syringe) for the withdrawal of blood or body fluids from insert name's body.
5. The defendant intended to expose insert name to insert disease.
6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

As used in this instruction "sexual intercourse" means penetration of the female sex organ by the male sex organ. Any penetration, however slight, is sufficient to constitute sexual intercourse.

As used in this instruction "sodomy" means anal penetration, however slight, of a (male) (female) by a male sex organ.

Notes on Use

For authority, see K.S.A. 21-5424. Exposing another to a life threatening communicable disease is a severity level 7, person felony.

For authority for this definition of sexual intercourse, see K.S.A. 21-5501(a) and K.S.A. 21-5424(c)(1). For authority for this definition of sodomy, see K.S.A. 21-5501(b) and K.S.A. 21-5424(c)(2). Give the appropriate definition only if the defendant is alleged to have committed sexual intercourse or sodomy.

54.440

HUMAN TRAFFICKING

The defendant is charged with human trafficking. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally (recruited) (harbored) (transported) (provided) (obtained) insert name for (labor) (services) through the use of (force) (fraud) (coercion) for the purpose of subjecting insert name to (involuntary servitude) (forced labor).**

OR

- 1. The defendant intentionally (benefitted financially) (received anything of value) from participating in a venture that the defendant had reason to know involved the (recruiting) (harboring) (transporting) (providing) (obtaining) of a person for (labor) (services) through the use of (force) (fraud) (coercion) for the purpose of subjecting the person to (involuntary servitude) (forced labor).**

OR

- 1. The defendant knowingly coerced employment by [(obtaining) (maintaining)] [(labor) (services)] that were (performed) (provided) by insert name through insert one of the following:**

- (causing) (threatening to cause) injury to any person.**
or
- (physically restraining) (threatening to physically restrain) another person.**
or
- [(abusing) (threatening to abuse)] [(the law) (legal process)].**
or
- threatening to withhold (food) (lodging) (clothing).**
or

- **knowingly (destroying) (concealing) (removing) (confiscating) (possessing) any (actual) (purported) government identification document of another person.**

OR

1. **The defendant knowingly held another person in a condition of peonage in satisfaction of a debt owed to the defendant.**
2. **This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

[As used in this instruction, "peonage" means a condition of involuntary servitude in which the victim is forced to work for another person by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or legal process.]

Notes on Use

For authority, see K.S.A. 21-5426(a). If the defendant is charged with holding the victim in a condition of peonage, give the bracketed definition.

54.450

**AGGRAVATED HUMAN TRAFFICKING —
ADULT OR MINOR VICTIM
K.S.A. 21-5426(b)(1), (b)(2), and (b)(3)**

The defendant is charged with aggravated human trafficking. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant intentionally (recruited) (harbored) (transported) (provided) (obtained) insert name for (labor) (services) through the use of (force) (fraud) (coercion) for the purpose of subjecting insert name to (involuntary servitude) (forced labor).

OR

1. The defendant intentionally (benefitted financially) (received something of value) from participating in a venture that the defendant had reason to know involved the (recruiting) (harboring) (transporting) (providing) (obtaining) of insert name for (labor) (services) through the use of (force) (fraud) (coercion) for the purpose of subjecting insert name to (involuntary servitude) (forced labor).

OR

1. The defendant knowingly coerced employment by [(obtaining) (maintaining)] [(labor) (services)] that were (performed) (provided) by insert name through insert one of the following:
 - (causing) (threatening to cause) injury to any person.
 - or
 - (physically restraining) (threatening to physically restrain) another person.
 - or
 - [(abusing) (threatening to abuse)] [(the law) (legal process)].
 - or

- threatening to withhold (food) (lodging) (clothing).
- or
- knowingly (destroying) (concealing) (removing) (confiscating) (possessing) any (actual) (purported) government identification document of another person.

OR

1. The defendant knowingly held insert name in a condition of peonage in satisfaction of a debt owed to the defendant.
2. This act (involved the [commission] [attempted commission] of kidnapping) (was committed in whole or in part for the purpose of the sexual gratification of the defendant or another) (resulted in a death).
- [3. At the time of the act, the defendant was 18 or more years old and insert initials of child was less than 14 years old. The State need not prove defendant knew insert initials of child's age.]
3. or 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[As used in this instruction, "kidnapping" is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold the person [(for ransom) (as a shield) (as a hostage)] [to facilitate (flight) (the commission of any crime)] [to (inflict bodily injury) (terrorize the person or another)] [to interfere with the performance of any governmental or political function].]

[As used in this instruction, "peonage" means a condition of involuntary servitude in which the person is forced to work for another person by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or legal process.]

Notes on Use

For authority, see K.S.A. 21-5426(b)(1), (b)(2), and (b)(3).

This instruction may apply to either adult or minor victims. PIK 4th 54.451 and 54.452 apply to offenses under subsections (b)(4) and (b)(5), both of which require that the victim be a "child," defined by subsection (i)(1) as a person under 18 years of age.

Aggravated human trafficking is a severity level 1, person felony except as provided in subsection (c)(3). If the defendant was 18 or more years old and the victim was less than 14 years

old, an offense of aggravated human trafficking, or attempt, conspiracy, or criminal solicitation to commit aggravated human trafficking is an off-grid, person felony.

To convict the defendant of the off-grid level of this crime, there must be evidence presented at trial from which the jury can determine beyond a reasonable doubt the ages of the defendant and victim as an element of the crime, and the bracketed Element No. 3 should be used in the instruction.

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54.451

AGGRAVATED HUMAN TRAFFICKING—MINOR VICTIM
K.S.A. 21-5426(b)(4)

The defendant is charged with aggravated human trafficking. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant, by any means, (recruited) (harbored) (transported) (provided) (obtained) insert initials of child, knowing that, with or without force, fraud, threat, or coercion, (he) (she) would be used (in forced labor) (for involuntary servitude) (for the sexual gratification of defendant or another involving the exchange of anything of value).
2. At the time of this act, (insert initials of child was less than 18 years old) (the defendant was 18 or more years old and insert initials of child was less than 14 years old). The State need not prove defendant knew insert initials of child's age.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5426(b)(4). This instruction applies only when the victim is a "child," defined in K.S.A. 21-5426(i)(1) as a person under 18 years of age. PIK 4th 54.452 should be used for offenses under K.S.A. 21-5426(b)(5), which also applies only when the victim is a child.

PIK 4th 54.450 applies to offenses under K.S.A. 21-5426(b)(1), (b)(2), and (b)(3), which may apply whether the victim is a child or an adult.

Aggravated human trafficking is a severity level 1, person felony.

If the defendant was 18 or more years old and the victim was less than 14 years old, aggravated human trafficking or attempt, conspiracy, or criminal solicitation to commit aggravated human trafficking is an off-grid, person felony. To convict the defendant of the off-grid level of this crime, there must be evidence presented at trial from which the jury can determine the ages of the defendant and victim beyond a reasonable doubt as an element of the crime, and the second parenthetical option of Element No. 2 should be used in the instruction.

Comment

In the context of K.S.A. 21-3447(a)(2) [now K.S.A. 21-5426(b)(4)], "the phrase 'used to engage in forced labor, involuntary servitude or sexual gratification' indicates the statute is limited to situations where a minor has been exploited. See Webster's II New College Dictionary 1215 (1999) (defining 'use' as including '[t]o put to some purpose' and '[t]o exploit for one's own advantage or gain')." *State v. Williams*, 299 Kan. 911, 921, 329 P.3d 400 (2014).

54.452

AGGRAVATED HUMAN TRAFFICKING—MINOR VICTIM
K.S.A. 21-5426(b)(5)

The defendant is charged with aggravated human trafficking. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant hired insert initials of child to engage in (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the defendant or another) (sexual intercourse) (sodomy) (any unlawful sexual act).
2. The defendant hired insert initials of child by giving, offering, or agreeing to give, anything of value to any person.
3. At the time of this act, (insert initials of child was less than 18 years old) (the defendant was 18 or more years old and insert initials of child was less than 14 years old).
4. The defendant recklessly disregarded the age of insert initials of child. The State need not prove defendant knew insert initials of child's age.
5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5426(b)(5). This instruction applies only when the victim is a "child," defined in K.S.A. 21-5426(i)(1) as a person under 18 years of age. PIK 4th 54.451 should be used for offenses under K.S.A. 21-5426(b)(4), which also applies only when the victim is a child.

PIK 4th 54.450 applies to offenses under K.S.A. 21-5426(b)(1), (b)(2), and (b)(3), which may apply whether the victim is a child or an adult.

Aggravated human trafficking is a severity level 1, person felony.

If the defendant was 18 or more years old and the victim was less than 14 years old, aggravated human trafficking or attempt, conspiracy, or criminal solicitation to commit aggravated human trafficking is an off-grid, person felony. To convict the defendant of the off-grid level of this crime, there must be evidence presented at trial from which the jury can determine the ages of the defendant and victim beyond a reasonable doubt as an element of the crime, and the second parenthetical option of Element No. 3 should be used in the instruction.

54.453

**AFFIRMATIVE DEFENSE TO AGGRAVATED
HUMAN TRAFFICKING**

K.S.A. 21-5426(b)(4) and (b)(5)

It is a defense to the charge of aggravated human trafficking under Instruction No. insert instruction number(s) of these instructions that the defendant was less than 18 years of age at the time of the act charged against the defendant and committed the act charged because the defendant was subjected, at the time of the act charged, to (human trafficking) (aggravated human trafficking).

When asserted as a defense, "human trafficking" means:

(Insert name of perpetrator) (A person) intentionally (recruited) (harbored) (transported) (provided) (obtained) the defendant for (labor) (services) through the use of (force) (fraud) (coercion) for the purpose of subjecting the defendant to (involuntary servitude) (forced labor).

OR

(Insert name of perpetrator) (A person) intentionally (benefitted financially) (received anything of value) from participating in a venture having reason to know the venture involved the (recruiting) (harboring) (transporting) (providing) (obtaining) of the defendant for (labor) (services) through the use of (force) (fraud) (coercion) for the purpose of subjecting the defendant to (involuntary servitude) (forced labor).

OR

(Insert name of perpetrator) (A person) [(obtained) (maintained)] [(labor) (services)] that [(was) (were)] (performed) (provided) by the defendant by knowingly coercing the defendant's employment through insert one of the following :

- (causing) (threatening to cause) injury to (the defendant) (any person).

or

- [(physically restraining) (threatening to physically restrain)] [(the defendant) (another person)].

or

- [(abusing) (threatening to abuse)] [(the law) (legal process)].
or
- threatening to withhold (food) (lodging) (clothing) from the defendant.
or
- knowingly (destroying) (concealing) (removing) (confiscating) (possessing) any (actual) (purported) government identification document of (the defendant) (another person).

OR

(Insert name of perpetrator) (A person) knowingly held the defendant in a condition of peonage in satisfaction of a debt owed to (insert name of perpetrator) (the other person).

As used in this instruction, "peonage" means a condition of involuntary servitude in which the victim is forced to work for another person by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or legal process.

[When asserted as a defense, "aggravated human trafficking" means:

(Insert name of perpetrator) (A person)] (recruited) (harbored) (transported) (provided) (obtained) the defendant, by any means, knowing that, with or without force, fraud, threat, or coercion, the defendant would be used (in forced labor) (for involuntary servitude) (for the sexual gratification of the perpetrator, perpetrators, or another involving the exchange of anything of value).

OR

1. (Insert name of perpetrator) (A person) hired the defendant to engage in (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the defendant or another) (sexual intercourse) (sodomy) (any unlawful sexual act).
2. (Insert name of perpetrator) (A person) hired the defendant by giving, offering, or agreeing to give, anything of value to any person.

3. **(Insert name of perpetrator) (The person who hired the defendant) recklessly disregarded the age of the defendant.]**

Notes on Use

For authority, see K.S.A. 21-5426(e).

The affirmative defense applies only to the crimes defined in subsections (b)(4) and (b)(5) of K.S.A. 21-5426. The court should insert in the blank in the first paragraph the instruction number of any charge to which the defense applies.

K.S.A. 21-5426(b)(1), (2) and (3) define aggravated human trafficking as simple human trafficking with additional aggravating factors (kidnapping, sexual gratification, and death, respectively). Subsections (b)(4) and (5) of the statute define alternative methods of committing aggravated human trafficking which do not incorporate, and are independent of, the definition of simple human trafficking.

If, pursuant to sections (b)(1), (2), and (3) of the statute, the defendant establishes the requisite human trafficking elements predicate to establishing aggravated human trafficking, the defendant has, by definition, already established the defense. Requiring the defendant to show, and requiring the jury to find, additional aggravating factors to establish aggravated human trafficking under those subsections is unnecessary. Therefore, the committee has not included alternatives under those aggravated human trafficking subsections in this instruction.

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54.454

**UNLAWFUL USE OF COMMUNICATION FACILITY
FOR HUMAN TRAFFICKING OR
AGGRAVATED HUMAN TRAFFICKING**

The defendant is charged with the unlawful use of a communication facility for (human trafficking) (aggravated human trafficking). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (intentionally) used a communication facility in (committing) (causing the commission of) (facilitating the commission of) the crime of (human trafficking) (aggravated human trafficking).

OR

1. The defendant (knowingly) (intentionally) used a communication facility in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the crime of (human trafficking) (aggravated human trafficking).
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The elements of the crime of (human trafficking) (aggravated human trafficking) are (set forth in Instruction No. ____) (as follows: _____).

"Communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes telephone, wire, radio, computer networks, beepers, pagers, and all means of communication.

["Attempt" means an overt act toward the perpetration of a crime done by a person who intends to commit the crime, but fails in the perpetration or is prevented or intercepted in executing the crime.]

["Conspiracy" means an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all the facts and circumstances.]

["Solicitation" means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.]

Notes on Use

For authority, see K.S.A. 21-6424(a)(1) and (2), and K.S.A. 21-5426. Violation of this statute is a severity level 7, person felony. K.S.A. 21-6424(b).

The elements of the underlying felony violation alleged under K.S.A. 21-5426 should be set forth in the concluding portion of the instruction.

The definition of "attempt" is derived from K.S.A. 21-5301(a); the definition of "conspiracy" is derived from K.S.A. 21-5302(a); and the definition of "solicitation" is derived from K.S.A. 21-5303(a).

54.460

STALKING

The defendant is charged with stalking. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant recklessly engaged in conduct targeted at insert name of target which would cause a reasonable person in the same circumstances as insert name of target to fear for ([his] [her] safety) (the safety of a member of [his] [her] immediate family) and insert name of target was actually placed in fear.
2. The defendant did two or more of the following acts: insert the defendant's acts from the bulleted list in the "course of conduct" definition in the Notes on Use below.
3. In committing these acts, the defendant had a continuity of purpose.
4. These acts occurred over a period of time between the _____ day of _____, _____, and the _____ day of _____, _____, in _____, County, Kansas.

OR

1. The defendant engaged in conduct targeted at insert name of target that the defendant knew would place insert name of target in fear for ([his] [her] safety) (the safety of a member of [his] [her] immediate family).
2. The defendant did two or more of the following acts: insert the defendant's acts from the bulleted list in the "course of conduct" definition in the Notes on Use below.
3. In committing these acts, the defendant had a continuity of purpose.
4. These acts occurred over a period of time between the _____ day of _____, _____, and the _____ day of _____, _____, in _____, County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5427(a)(1) and (a)(2).

For the crime of stalking, the following definitions apply:

"Course of conduct" means two or more acts over a period of time, however short, which show a continuity of purpose. A course of conduct includes any of the following acts or a combination of such acts targeted at a specific person or a member of the targeted person's immediate family:

- Threatening the targeted person's safety or the safety of a member of the targeted person's immediate family;
- Following, approaching, or confronting the targeted person or a member of the targeted person's immediate family;
- Appearing in close proximity to, or entering the targeted person's residence, place of employment, school, or other place where the targeted person can be found, or, the residence, place of employment, or school of a member of the targeted person's immediate family;
- Causing damage to the targeted person's residence or property, or that of a member of the targeted person's immediate family;
- Placing any object on the targeted person's property, or the property of a member of the targeted person's immediate family, either directly or through a third person;
- Causing injury to the targeted person's pet, or a pet belonging to a member of the targeted person's immediate family;
- Any act of communication.

A course of conduct does not include constitutionally protected activity nor conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person.

"Communication" means to impart a message by any method of transmission. A message includes any information or material by written or printed note, letter, or package. Methods of transmission include telephoning, personally delivering, sending or having delivered a message by mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer.

"Computer" means a programmable electronic device capable of accepting and processing data.

"Immediate family" means father, mother, stepparent, child, stepchild, sibling, spouse, or grandparent of the targeted person, any person residing in the household of the targeted person, or any person involved in an intimate relationship with the targeted person.

The penalty for stalking varies with the different subsections of the statute. Alternatives A, B, and C reflect those three statutory subsections. If Alternative A is used, the crime is a class A, person misdemeanor for a first conviction and a severity level 7, person felony for any subsequent convictions. If Alternative B listed above is the basis of the instruction, it is a class A, person misdemeanor for a first conviction and a severity level 5, person felony for any subsequent convictions. Alternative C above is a severity level 9, person felony for a first conviction and a severity level 5, person felony for any subsequent conviction.

Comment

Before July 1, 2011 Revisions to Criminal Code.

"In order to establish that a perpetrator committed an 'act of communication' under Kansas' stalking statute, K.S.A. 2010 Supp. 21-3438, the State must show that the perpetrator sent or transmitted a communication to the victim and the victim received the communication." Depending on the circumstances, this can be proven when a defendant calls the victim's phone in violation of a protective order and the victim sees on caller ID that the defendant is calling. *State v. Kendall*, 300 Kan. 515, 331 P.3d 763, Syl. ¶¶ 1-2 (2014).

54.470

STALKING—AFTER SERVICE OF PROTECTIVE ORDER

The defendant is charged with stalking. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was (served with) (given notice of) a protective order prohibiting contact with insert name of target.**
- 2. The defendant thereafter recklessly: insert the defendant's acts from the bulleted list in the "course of conduct" definition in the Notes on Use below.**
- 3. That act violates the protective order.**
- 4. That act would cause a reasonable person to fear for ([his] [her] safety) (the safety of a member of [his] [her] immediate family).**
- 5. Insert name of target was placed in such fear.**
- 6. This act occurred on the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5427(a)(3).

For the crime of stalking, the following definitions apply:

"Course of conduct" means two or more acts over a period of time, however short, which show a continuity of purpose. A course of conduct includes any of the following acts or a combination of such acts targeted at a specific person or a member of the targeted person's immediate family:

- Threatening the targeted person's safety or the safety of a member of the targeted person's immediate family;
- Following, approaching, or confronting the targeted person or a member of the targeted person's immediate family;
- Appearing in close proximity to, or entering the targeted person's residence, place of employment, school, or other place where the targeted person can be found, or the residence, place of employment, or school of a member of the targeted person's immediate family;
- Causing damage to the targeted person's residence or property, or that of a member of the targeted person's immediate family;

- Placing any object on the targeted person's property, or the property of a member of the targeted person's immediate family, either directly or through a third person;
- Causing injury to the targeted person's pet, or a pet belonging to a member of the targeted person's immediate family;
- Any act of communication.

A course of conduct does not include constitutionally protected activity nor conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person.

"Communication" means to impart a message by any method of transmission. A message includes any information or material by written or printed note, letter, or package. Methods of transmission include telephoning, personally delivering, sending or having delivered a message by mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer.

"Computer" means a programmable electronic device capable of accepting and processing data.

"Immediate family" means father, mother, stepparent, child, stepchild, sibling, spouse, or grandparent of the targeted person, any person residing in the household of the targeted person, or any person involved in an intimate relationship with the targeted person.

54.480

BLACKMAIL

The defendant is charged with blackmail. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant threatened to communicate (accusations) (statements) about insert name that would subject insert name to public (ridicule) (contempt) (degradation).
2. The defendant did so intentionally to insert one of the following:
 - (gain) (attempt to gain) something of value from insert name.
 - or
 - (compel) (attempt to compel) insert name to act against (his) (her) will.

OR

1. The defendant threatened to disseminate [(a) (an)] (videotape) (photograph) (film) (image) of an identifiable person [insert name if known].
2. The defendant did so intentionally to insert one of the following:
 - (gain) (attempt to gain) something of value from insert name.
 - or
 - (compel) (attempt to compel) insert name to act against (his) (her) will.
3. (The defendant) (A person) obtained the (videotape) (photograph) (film) (image):
 - by knowingly and without lawful authority (installing) (using) a concealed (camcorder) (motion picture camera) (photographic camera of any type) to secretly (videotape) (film) (photograph) (record) insert name if known, by electronic or other means, (under or through the clothing

worn by insert name if known) (when insert name if known was nude or in a state of undress);

- for the purpose of viewing the (body) (undergarments) of insert name if known ;
- without consent or knowledge of insert name if known ;
- with the intent to invade the privacy of insert name if known ; and
- under circumstances in which insert name if known had a reasonable expectation of privacy.

3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5428. Blackmail in violation of subsection (a)(1) of the statute is a severity level 7, nonperson felony. Blackmail in violation of subsection (a)(2) is a severity level 4, person felony.

In the second alternative Element No. 1, insert a name as shown in the brackets if the charging document included the name of the person depicted in the video or photograph. In Element No. 3 of the second alternative, replace the blank lines with the words "the identifiable person" if the charging document did not include the depicted person's name.

55.010

SEXUAL INTERCOURSE—DEFINITION

Sexual intercourse means any penetration of the female sex organ by (a finger) (the male sex organ) (any object). Any penetration, however slight, is sufficient to constitute sexual intercourse.

[Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of the performance of:

- (a) generally recognized health care practices.**
- or**
- (b) a body cavity search conducted in accordance with the law.]**

Notes on Use

For authority, see K.S.A. 21-5501. This instruction should be given in all rape prosecutions. The applicable parenthetical reference in the first paragraph should be selected.

Comment

Before July 1, 2011 Revisions to Criminal Code

The trial court's failure to give a definition of sexual intercourse was not reversible error when no objection was raised at trial and the instruction given was complete. *State v. James*, 217 Kan. 96, 100, 535 P.2d 991 (1975).

A charge of attempted rape may be proven without evidence of attempted penetration if the surrounding circumstances provide sufficient evidence from which a rational factfinder could conclude that the attacker intended to rape the victim. *State v. Hanks*, 236 Kan. 524, 694 P.2d 407 (1985).

The sufficiency of penetration is discussed in *State v. Ragland*, 173 Kan. 265, 246 P.2d 276 (1952). In *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994), the Kansas Supreme Court held that actual penetration of the vagina or rupturing of the hymen is not required; penetration of the vulva or labia is sufficient to constitute sexual intercourse.

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55.020

SEX OFFENSES—DEFINITIONS

A. The word "spouse" means a lawful husband or wife, unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance, divorce, or relief under the Protection From Abuse Act.

B. Unlawful sexual acts are defined as follows:

(a) Rape.

Rape means sexual intercourse with a person who does not consent to sexual intercourse, under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was (known by) (reasonably apparent to) the offender; or (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was (known by) (reasonably apparent to) the offender.

Rape is also defined as sexual intercourse with a child who is less than 14 years old.

Rape is also defined as sexual intercourse with a person who does consent to the intercourse, but the consent was obtained by a knowing misrepresentation that the intercourse was either (1) medically; or (2) therapeutically needed; or by a knowing misrepresentation that the intercourse was a legally required procedure and the misrepresentation was made within the scope of the defendant's authority.

(b) Indecent liberties with a child.

Indecent liberties with a child means engaging in either of the following acts with a child who is 14 or 15 years old: (1) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender or both; (2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another.

(c) Aggravated indecent liberties with a child.

Aggravated indecent liberties with a child means: (1) sexual intercourse with a child 14 or 15 years old; or (2) engaging in any of the following acts with a child 14 or 15 years old who does not consent thereto: (a) any lewd fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; or (b) causing the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another; or (3) engaging in any of the following acts with a child who is less than 14 years old: (a) any lewd fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; (b) soliciting the child to engage in any lewd fondling or touching of the person of another with intent to arouse or satisfy the sexual desires of the child, offender or another.

(d) Sodomy.

Sodomy means: (1) oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; (2) oral or anal sexual relations between a person and an animal; (3) sexual intercourse with an animal; or (4) anal penetration, however slight, of a male or female by any body part or object. Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search conducted in accordance with the law.

(e) Criminal sodomy.

Criminal sodomy means: (1) sodomy between a person and an animal; or (2) sodomy with a person who is 14 or 15 years old; or (3) causing a child 14 or 15 years old to engage in sodomy with any person or animal.

(f) Aggravated criminal sodomy.

Aggravated criminal sodomy means: (1) sodomy with a child who is less than 14 years old; (2) causing a child less than 14 years old to engage in sodomy with any person or an animal; or (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under conditions when: (a) the victim is overcome by force or fear; (b) the victim is unconscious or physically powerless; (c) the victim is incapable of giving consent because of mental deficiency or disease,

which was (known by) (reasonably apparent to) the offender; or (d) the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was (known by) (reasonably apparent to) the offender.

(g) Lewd and lascivious behavior.

Lewd and lascivious behavior means: (1) publicly engaging in otherwise lawful sexual intercourse or sodomy with knowledge or reasonable anticipation that the participants are being viewed by others, or (2) publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another.

(h) Lewd fondling or touching.

Lewd fondling or touching means fondling or touching in a manner which tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person. Lewd fondling or touching does not require contact with the sex organ of one or the other.

(i) Sexual battery.

Sexual battery means the intentional touching of the person of another who is 16 or more years old, who is not the spouse of the offender and who does not consent to the touching, with the intent to arouse or to satisfy the sexual desires of the offender or another.

(j) Aggravated sexual battery.

Aggravated sexual battery means the intentional touching of the person of another who is 16 or more years old and who does not consent thereto, with intent to arouse or satisfy the sexual desires of the offender or another under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was (known by) (reasonably apparent to) the offender; (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender.

Notes on Use

Authority for the definitions is contained in several statutes: Rape, K.S.A. 21-5503; indecent liberties with a child, K.S.A. 21-5506(a); aggravated indecent liberties with a child, K.S.A. 21-5506(b); sodomy, K.S.A. 21-5501(b); criminal sodomy, K.S.A. 21-5504(a); aggravated criminal sodomy, K.S.A. 21-5504(b); lewd and lascivious behavior, K.S.A. 21-5513; sexual battery, K.S.A. 21-5505(a); and aggravated sexual battery, K.S.A. 21-5505(b).

In defining the term "spouse," only the applicable language should be used. The Committee emphasizes this definition is only applicable to PIK 4th Chapter 55—Sex Offenses.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Dinh Loc Ta*, 296 Kan. 230, 230-31, Syl.¶ 5, 290 P.3d 652 (2012), the Supreme Court found that a defendant's mental state should not be used to define or determine whether the touching or fondling is lewd. Any contrary language in *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), was overruled. Also, the Supreme Court held that a defendant's action of touching his own penis in order to expose his penis to a child did not satisfy the element of lewd fondling or touching. *State v. Warren*, 295 Kan. 629, 285 P.3d 1036 (2012).

55.030

RAPE

The defendant is charged with rape. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly engaged in sexual intercourse with insert name.
2. Insert name did not consent to sexual intercourse.
3. The sexual intercourse occurred under circumstances when insert one of the following:
 - insert name was overcome by (force) (fear).

or

 - insert name was (unconscious) (physically powerless).

OR

1. The defendant knowingly engaged in sexual intercourse with insert name.
2. Insert name was incapable of giving consent to sexual intercourse because of insert one of the following:
 - mental deficiency or disease, which condition was (known by) (reasonably apparent to) the defendant.

or

 - the effect of any (alcoholic beverage) (narcotic) (drug) (other substance), which condition was (known by) (reasonably apparent to) the defendant.

OR

1. The defendant engaged in sexual intercourse with insert name.
2. Insert name consented to sexual intercourse, but (his) (her) consent was obtained by the defendant knowingly misrepresenting that the sexual intercourse was a insert one of the following:
 - (medically) (therapeutically) necessary procedure.

or

- **legally required procedure within the scope of the defendant's authority.**

3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[It is not a defense that the defendant did not know or have reason to know that insert name (did not consent to the sexual intercourse) (was overcome by force or fear) (was unconscious or physically powerless).]

"Sexual intercourse" means: Insert applicable portions of PIK 4th 55.010, Sexual Intercourse—Definition.

Notes on Use

For authority, see K.S.A. 21-5503. Rape as described in K.S.A. 21-5503(a)(1) or (2) is a severity level 1, person felony. Rape as described in K.S.A. 21-5503(a)(4) or (5) is a severity level 2, person felony.

Insert the bracketed language when using the first and third alternatives (K.S.A. 21-5503(a)(1), (a)(4), or (a)(5)) for offenses committed after July 1, 2011.

Comment

In *State v. Wallin*, 52 Kan. App. 2d 256, 366 P.3d 651 (2016) *rev. denied* 305 Kan. 1257 (2017), the Court of Appeals found that in a prosecution for rape, aggravated criminal sodomy, or aggravated sexual battery, the victim's incapacity to give consent because of mental deficiency or disease may be proved, depending on the facts of the case, without expert testimony.

Before July 1, 2011 Revisions to Criminal Code

For cases dealing with the rape shield statute (K.S.A. 21-3525), see the Comment to PIK 3d 57.03, Sex Offenses—Victim Credibility; Rape Shield Statute.

Whether a victim is overcome by fear, for purposes of K.S.A. 21-3502(a)(1)(A), is a question to be resolved by the fact finder. The force required to sustain a rape conviction does not require a rape victim to resist the assailant to the point of becoming the victim of a battery or aggravated assault nor does Kansas law require that a rape victim be physically overcome by force in the form of beating or physical restraint in addition to forced sexual intercourse. See *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994).

The phrase "force or fear" as used in the rape statute does not create alternative means of committing rape. *State v. Nunez*, 298 Kan. 661, 316 P.3d 717 (2014).

In *State v. Cantrell*, 234 Kan. 426, 434, 673 P.2d 1147 (1983), the Kansas Supreme Court held that the crime of rape under K.S.A. 21-3502 did not require a specific intent to commit rape. Language to the contrary in *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974), and in *State*

v. Carr, 230 Kan. 322, 634 P.2d 1104 (1981) was overruled. Since rape is a general intent crime and PIK 3d 57.01 follows the language of the statute, the lack of the word "intentionally" in the instruction is proper. *State v. Plunkett, Jr.*, 261 Kan. 1024, 934 P.2d 113 (1997).

In *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978), the Supreme Court in a 4-3 decision considered whether the defendant's three attempted rape convictions and two aggravated sodomy convictions were multiplicitous. The Court found that the defendant's conduct constituted one continuous occurrence because the only difference in the allegations of each charge was a lapse of a few minutes between each offense and the facts necessary to prove the acts. *Dorsey* was later distinguished in *State v. Wood*, 235 Kan. 915, 686 P.2d 128 (1984), where the Supreme Court held the trial court did not err in refusing to merge two counts of rape which occurred two or three hours apart. *Dorsey* was further distinguished in *State v. Howard*, 243 Kan. 699, 763 P.2d 607 (1988), which rejected a claim that multiple rape and sodomy convictions were multiplicitous because the acts occurred over a time span of 1½ to 3 hours and were separate and distinct, occurred at different times and locations, and were separated from each other by other sexual acts. In *State v. Richmond*, 250 Kan. 376, 827 P.2d 743 (1992), the defendant was convicted of two counts of rape which occurred within one hour and upon the same victim. The defendant's claim of multiplicity was rejected by the Supreme Court which held the two incidents to be clearly separate. The *Richmond* opinion further notes that "the propriety of the result reached in *Dorsey* is questionable." In accord see *State v. Long*, 26 Kan. App. 2d 644, 993 P.2d 1237 (1999), *rev. denied* 268 Kan. 852 (2000), which held that five separate rape convictions involving the same victim, in the same apartment, and within a period of 1 to 2 hours were not multiplicitous.

A person may be convicted of rape if consent is withdrawn after the initial consensual penetration but intercourse is continued by the use of force or fear. However, when consent is withdrawn after penetration the defendant is entitled to a reasonable time in which to act after the withdrawn consent is communicated to the defendant. Whether the termination of intercourse occurs within a reasonable time is to be determined by the jury, taking into account the manner in which consent was withdrawn and the particular facts of each case. *State v. Bunyard*, 281 Kan. 392, 133 P.3d 14 (2006).

The Supreme Court in *State v. Flynn*, 299 Kan. 1052, 329 P.3d 429 (2014), disapproved of *Bunyard's* holding that a defendant is entitled to a reasonable time in which to act after consent is withdrawn and communicated to the defendant. If the evidence at trial suggests the victim initially consented but withdrew consent after penetration, the trial court *must* instruct the jury that the defendant may be convicted of rape even though consent is given to the initial penetration but only if the consent is withdrawn, the withdrawal of consent is communicated to the defendant, and the defendant continues the intercourse through compulsion. The Court, however, raised the issue but did not determine whether the modified *Bunyard* instructions recommended above would be appropriate for a case arising after the statute was amended as of July 1, 2011 to add the language in K.S.A. 21-5503(e).

In *State v. Washington*, 226 Kan. 768, 602 P.2d 261 (1979), the Court held that a prior consistent out-of-court statement made by the victim to another person shortly after the offense was admissible at trial to corroborate the trial testimony of the victim.

Unless the defense is consent and the expert presenting the testimony has special training in psychiatry, evidence of the rape trauma syndrome is inadmissible. Even if the evidence is admissible, the expert is not permitted to express an opinion as to whether the victim was raped. See *State v. Bressman*, 236 Kan. 296, 303, 304, 689 P.2d 901 (1984).

Lewd and lascivious behavior consists of elements separate and distinct from the crime of rape. The trial court committed no error when it failed to give an instruction on lewd and

lascivious behavior when the defendant was charged with rape. *State v. Davis*, 236 Kan. 538, 542, 694 P.2d 418 (1985).

In *Keim v. State*, 13 Kan. App. 2d 604, 608, 777 P.2d 278 (1989), the Court held that legislation prohibiting intercourse with a victim incapable of giving consent because of mental deficiency or disease was not unconstitutionally vague.

Adultery is not a lesser included offense of forcible rape because it is a crime of consenting parties and would require that at least one of the parties be married. *State v. Platz*, 214 Kan. 74, 77, 519 P.2d 1097 (1974).

Rape is not a lesser included offense of aggravated kidnapping. *State v. Schriner*, 215 Kan. 86, 90, 523 P.2d 703 (1974); *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). However, rape constitutes "bodily harm" to make a kidnapping aggravated kidnapping. *State v. Barry*, 216 Kan. 609, 618, 533 P.2d 1308 (1974); *State v. Ponds and Garrett*, 218 Kan. 416, 420-421, 543 P.2d 967 (1975); *State v. Adams*, 218 Kan. 495, 504, 545 P.2d 1134 (1976).

Battery is not a lesser included offense of attempted rape. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).

Patronizing a prostitute is not a lesser included offense of rape or aggravated sodomy. See *State v. Blue*, 225 Kan. 576, 580, 592 P.2d 897 (1979).

Evidence of similar crimes with proper limiting instructions under K.S.A. 60-455 may be relevant and admissible in prosecutions for rape.

The court should refrain from including all possible alternative means of rape [2(a), (b) and (c)] absent substantial evidence to support each alternative means. *State v. Ice*, 27 Kan. App. 2d 1, 997 P.2d 737 (2000).

The act proscribed by K.S.A. 21-3502(a)(1)(C) is sexual intercourse with a victim incapable of giving consent, but the statute requires a further state of mind of the offender, *i.e.*, knowledge of that condition if not reasonably apparent. This is a state of mind that is beyond the general criminal intent required for rape. Accordingly, the knowledge requirement of the statute justifies a voluntary intoxication defense. *State v. Smith*, 39 Kan. App. 2d 204, 178 P.3d 672 *rev. denied* 286 Kan. 1185 (2008).

In *State v. Britt*, 295 Kan. 1018, 287 P.3d 905 (2012), the Supreme Court held that the definition of rape based on "penetration of the female sex organ by a finger, the male sex organ, or an object" did not create alternative means for committing the crime of rape. See also *State v. Miller*, 297 Kan. 516, 304 P.3d 1221 (2013).

55.031

RAPE—CHILD LESS THAN 14

The defendant is charged with rape. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant engaged in sexual intercourse with insert initials of child.**
- 2. At the time of intercourse, insert initials of child was less than 14 years old. The State need not prove the defendant knew the child's age.**
- 3. The defendant was 18 or more years old at the time the sexual intercourse occurred.**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

"Sexual intercourse" means: Insert applicable portions of PIK 4th 55.010, Sexual Intercourse—Definition.

Notes on Use

For authority, see K.S.A. 21-5503(a)(3). Rape as described in K.S.A. 21-5503(a)(3) is a severity level 1, person felony unless the defendant is 18 or more years of age. When the defendant is 18 or more years of age, rape with a child under the age of 14 is an off-grid, person felony.

In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 or more years old at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). "Where the defendant's age is an essential element of the crime, the defendant is entitled to have that element included in the jury instruction that enumerates the elements of the crime." The court errs if the question of the defendant's age is submitted to the jury in a special question on the verdict form rather than as one of the elements. *State v. Brown*, 298 Kan. 1040, Syl. ¶ 1, 318 P.3d 1005 (2014).

If there is some evidence that a defendant was not 18 or more years old at the time the sexual intercourse occurred, a lesser included instruction omitting the element regarding the defendant's age should be given.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Comment

Before July 1, 2011 Revisions to Criminal Code

Sexual intercourse or sodomy with a child who is less than 16 years of age is a crime regardless of whether the defendant is related to the victim or not. In cases involving sexual intercourse, defendant is guilty of rape or aggravated indecent liberties, and in cases of sodomy, defendant is guilty of criminal sodomy or aggravated criminal sodomy, depending upon whether the child is under 14 years of age or is between 14 and 16 years of age. Aggravated incest under K.S.A. 21-3603(2)(A) applies only to "otherwise lawful sexual intercourse or sodomy." Thus, it does not apply to sexual intercourse or sodomy with a child who is less than 16, since such conduct is unlawful. Nor does it apply to non-consensual sexual intercourse with a child who is between 16 and 18 years of age since that conduct is, respectively, rape or criminal sodomy. It applies only to consensual conduct with a child who is between 16 and 18 years of age. Thus, *State v. Sims*, 33 Kan. App. 2d 762, 108 P.3d 1007 (2005), held a parent was properly charged with rape of his child who was less than 14 years of age and could not be charged with aggravated incest. Decisions under former statutes, such as *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994), and *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), holding that parents could be charged with aggravated incest but not with forcible rape or indecent liberties with a child are not authoritative under current statutes.

The crime of aggravated indecent liberties with a child is not a lesser included offense of rape. *State v. Belcher*, 269 Kan. 2, 4 P.3d 1137 (2000). Language to the contrary in *State v. Burns*, 23 Kan. App. 2d 352, 931 P.2d 1258, *rev. denied* 262 Kan. 964 (1997), was specifically disapproved. The *Belcher* opinion further warns that *State v. Lilley*, 231 Kan. 694, 647 P.2d 1323 (1982) and *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983) were decided prior to the extensive changes to Kansas rape, indecent liberties, sodomy, and sexual battery laws enacted in 1993.

In *State v. Britt*, 295 Kan. 1018, 287 P.3d 905 (2012), the Supreme Court held that the definition of rape based on "penetration of the female sex organ by a finger, the male sex organ, or an object" did not create alternative means for committing the crime of rape. See also *State v. Miller*, 297 Kan. 516, 304 P.3d 1221 (2013).

55.040

RAPE—DEFENSE OF MARRIAGE

It is a defense to the charge of rape of a child less than 14 years old that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-5503(c). This instruction should be given only with respect to a prosecution of rape of a child less than 14 years old pursuant to 21-5503(a)(3) and not in cases of nonconsensual sexual intercourse.

Kansas does not recognize a common-law marriage contract if either party to the marriage is less than 18 years old. See K.S.A. 23-2502.

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55.050

CRIMINAL SODOMY

The defendant is charged with criminal sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant engaged in sodomy with an animal.

OR

1. The defendant engaged in sodomy with insert initials of child, who was 14 or 15 years old. The State need not prove the defendant knew the child's age.

OR

1. The defendant caused insert initials of child, who was 14 or 15 years old, to engage in sodomy with (a person other than the defendant) (an animal). The State need not prove the defendant knew the child's age.
2. The defendant acted intentionally, knowingly, or recklessly.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Sodomy" means: Insert applicable portions of definitions found in PIK 4th 55.020, Sex Offenses—Definitions.

Notes on Use

For authority, see K.S.A. 21-5504. Criminal sodomy between the defendant and an animal is a class B, nonperson misdemeanor. Criminal sodomy with a child 14 or 15 years old or causing a child 14 or 15 years old to engage in sodomy with a person or animal is a severity level 3, person felony. For a definition of "sodomy," see K.S.A. 21-5501(b) and PIK 4th 55.020, Sex Offenses—Definitions.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

If the crime is sexual intercourse with an animal, PIK 4th 55.010, Sexual Intercourse—Definition, should be given. Element No. 2 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

The Supreme Court in *State v. Fitzgerald*, 308 Kan 659, 664, 423 P.3d 497 (2018), held that "any person" in K.S.A. 21-5504(b)(2) means "a person other than the defendant."

Before July 1, 2011 Revisions to Criminal Code

In 2002, the Legislature amended K.S.A. 23-101 to provide that the State of Kansas shall not recognize a common-law marriage contract if either party to the marriage is less than 18 years old.

K.S.A. 21-5504(a)(1) provides that sodomy between persons who are 16 or more years of age and members of the same sex is a Class B misdemeanor. However, in 2003, the U.S. Supreme Court held that a Texas statute which prohibited certain sexual conduct between consenting adults of the same sex was unconstitutional. *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

In *State v. Wells*, 296 Kan. 65, 290 P.3d 590 (2012), the Supreme Court held that the phrase "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia" does not create two alternative means for committing the crime of sodomy. See also *State v. Britt*, 295 Kan. 1018, 287 P.3d 905 (2012).

55.060

AGGRAVATED CRIMINAL SODOMY—CHILD LESS THAN 14

The defendant is charged with aggravated criminal sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant engaged in sodomy with insert initials of child.

OR

1. The defendant caused insert initials of child to engage in sodomy with (a person other than the defendant) (an animal).
2. At the time of the act, insert initials of child was less than 14 years old. The State need not prove the defendant knew the child's age.
3. The defendant acted intentionally, knowingly, or recklessly.
4. The defendant was 18 or more years old at the time the sodomy occurred.
5. The act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Sodomy" means: Insert applicable portions of definitions found in PIK 4th 55.020, Sex Offenses—Definitions.

Notes on Use

For authority, see K.S.A. 21-5504(b). Aggravated criminal sodomy is a severity level 1, person felony. But, aggravated criminal sodomy as described in K.S.A. 21-5504(b)(1) or (2) and committed by an offender who is 18 or more years old is an off-grid, person felony. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 or more years old at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). "Where the defendant's age is an essential element of the crime, the defendant is entitled to have that element included in the jury instruction that enumerates the elements of the crime." The court errs if the question of the defendant's age is submitted to the jury in a special question on the verdict form rather than as one of the elements. *State v. Brown*, 298 Kan. 1040, Syl. ¶ 1, 318 P.3d 1005 (2014).

If there is some evidence that a defendant was not 18 or more years old at the time the sexual intercourse occurred, a lesser included instruction omitting the element regarding the defendant's age should be given.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Element No. 3 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

The Supreme Court in *State v. Fitzgerald*, 308 Kan 659, 664, 423 P.3d 497 (2018), held that "any person" in K.S.A. 21-5504(b)(2) means "a person other than the defendant."

Before July 1, 2011 Revisions to Criminal Code

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

Aggravated criminal sodomy is a general intent crime. *State v. Plunkett*, 261 Kan. 1024, 934 P.2d 113 (1997).

In *State v. Wilson*, 247 Kan. 87, 95, 795 P.2d 336 (1990), the Court stated: "We approve of the use of PIK 2d 57.08 in this case. We find no error in the use of the phrase anal sexual relations in place of the term anal copulation in the pattern instruction on aggravated criminal sodomy."

In *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989), the Court held that oral-genital stimulation between the tongue of a male and the genital area of a female is not sodomy under K.S.A. 21-3501(2). The Legislature amended the statute in L. 1990, ch. 149, § 2.

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties.

In *State v. Britt*, 295 Kan. 1018, 1025, 287 P.3d 905 (2012), the Supreme Court found that the specific definition of oral contact used in the statute — "oral contact or oral penetration of the female genitalia or oral contact with the male genitalia" — does not contain alternative means. See also *State v. Wells*, 296 Kan. 65, 290 P.3d 590 (2012).

55.070

AGGRAVATED CRIMINAL SODOMY—NO CONSENT

The defendant is charged with aggravated criminal sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant engaged in sodomy with insert name.

OR

1. The defendant caused insert name to engage in sodomy with (a person other than the defendant) (an animal).

2. Insert name did not consent to the sodomy.

3. The sodomy occurred under circumstances when insert one of the following:

- Insert name was overcome by (force) (fear).

or

- Insert name was unconscious or physically powerless.

4. The defendant acted intentionally, knowingly, or recklessly.

OR

1. The defendant engaged in sodomy with insert name.

2. Insert name was incapable of giving consent because of insert one of the following:

- mental deficiency or disease, which condition was (known by) (reasonably apparent to) the defendant.

or

- the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was (known by) (reasonably apparent to) the defendant.

3. The defendant acted intentionally, knowingly, or recklessly.

4. or 5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[It is not a defense that the defendant did not know or have reason to know that insert name (did not consent to the sodomy) (was overcome by force or fear) (was unconscious or physically powerless).]

"Sodomy" means: Insert applicable portions of definitions found in PIK 4th 55.020, Sex Offenses—Definitions .

Notes on Use

For authority, see K.S.A. 21-5504(b)(3). The crime of aggravated criminal sodomy is a severity level 1, person felony.

If the crime involves sexual intercourse with an animal, PIK 4th 55.010, Sexual Intercourse—Definition, should be given.

Element No. 4 in the first alternative and Element No. 3 in the second alternative are required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Insert the bracketed language when sodomy is charged under K.S.A. 21-5504(b)(3)(A) and (b)(3)(B) for offenses committed after July 1, 2011.

Comment

In *State v. Wallin*, 52 Kan. App. 2d 256, 366 P.3d 651 (2016) *rev. denied* 305 Kan. 1257 (2017), the Court of Appeals found that in a prosecution for rape, aggravated criminal sodomy, or aggravated sexual battery, the victim's incapacity to give consent because of mental deficiency or disease may be proved, depending on the facts of the case, without expert testimony.

The Supreme Court in *State v. Fitzgerald*, 308 Kan 659, 664, 423 P.3d 497 (2018), held that "any person" in K.S.A. 21-5504(b)(2) means "a person other than the defendant."

Before July 1, 2011 Revisions to Criminal Code

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

Use of an instruction that differed from PIK 3d 57.08-B was held erroneous in *State v. Castoreno*, 255 Kan. 401, 874 P.2d 1173 (1994).

In *State v. Britt*, 295 Kan. 1018, 1025, 287 P.3d 905 (2012), the Supreme Court found that the specific definition of oral contact used in the statute — "oral contact or oral penetration of the female genitalia or oral contact with the male genitalia" — does not contain alternative means. See also *State v. Wells*, 296 Kan. 65, 290 P.3d 590 (2012).

In *State v. Burns*, 295 Kan. 951, 964, 287 P.3d 261 (2012), the Supreme Court held that the definition of sodomy provides that anal penetration can be by any body part or object, but the language does not establish alternative means. Instead, it only provides for options within a means.

A person may be convicted of rape if consent is withdrawn after the initial consensual penetration but intercourse is continued by the use of force or fear. *State v. Bunyard*, 281 Kan. 392, 393, Syl. ¶ 9, 133 P.3d 14 (2006). *Bunyard* also applies in aggravated criminal sodomy cases when the initial consent is withdrawn. *State v. Franco*, 49 Kan. App. 2d 924, 319 P.3d 551 (2014). However, the Supreme Court in *State v. Flynn*, 299 Kan. 1052, 329 P.3d 429 (2014), disapproved of the part of *Bunyard's* holding which provided that a defendant was entitled to a reasonable time in which to act after consent is withdrawn and communicated to the defendant. If the evidence presented at trial suggests the victim initially consented but withdrew consent after penetration, *Flynn* held that the trial court *must* instruct the jury that the defendant may be convicted of rape even though consent is given to the initial penetration but only if the consent is withdrawn, the withdrawal of consent is communicated to the defendant, and the defendant continues the intercourse through compulsion. The Court, however, raised but did not determine the issue of whether the instructions required by *Flynn* would be appropriate for a case arising after the statute was amended as of July 1, 2011 to add the language in K.S.A. 21-5503(e).

The criminal sodomy statute which prohibits consensual anal intercourse and oral-genital contact between consenting persons of the same sex who are 16 or more years of age is unconstitutional and therefore cannot be considered as a lesser-included offense of aggravated criminal sodomy. *State v. Franco*, 49 Kan. App. 2d 924, 319 P.3d 551 (2014).

55.080

**DEFENSE TO CRIMINAL SODOMY/
AGGRAVATED CRIMINAL SODOMY**

It is a defense to (criminal sodomy) (aggravated criminal sodomy) that at the time of the offense the child was married to the defendant.

Notes on Use

For authority, see K.S.A. 21-5504(e). With respect to a prosecution of criminal sodomy, this instruction should be given only when the defendant is charged under K.S.A. 21-5504(a)(3).

With respect to a prosecution of aggravated criminal sodomy, this instruction should be given only when the defendant is charged under K.S.A. 21-5504(b)(1). This defense is not applicable to prosecutions in which the defendant is charged with nonconsensual sodomy under K.S.A. 21-5504(b)(3).

Kansas does not recognize a common-law marriage contract if either party to the marriage is less than 18 years old. See K.S.A. 23-2502.

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55.090

SEXUAL BATTERY

The defendant is charged with sexual battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant touched insert name.**
- 2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another.**
- 3. Insert name was not the spouse of defendant.**
- 4. Insert name did not consent to the touching.**
- 5. At the time of the act, insert name was 16 or more years old.**
- 6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5505(a). Sexual battery is a class A, person misdemeanor. The definition of a spouse, as contained in PIK 4th 55.020, Sex Offenses—Definitions, should be given.

In the event the charging document limits the sexual desires to those of one—the defendant or another person—the trial court should consider modifications to the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

Sexual battery is not a lesser included crime of aggravated kidnapping, attempted aggravated sodomy, or attempted rape. *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992).

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55.100

AGGRAVATED SEXUAL BATTERY

The defendant is charged with aggravated sexual battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant touched insert name with the intent to arouse or satisfy the sexual desires of the defendant or another.**
- 2. At the time of the touching, insert name was 16 or more years old.**
- 3. The touching was committed without the consent of insert name under circumstances when (she) (he) was insert one of the following:**
 - overcome by (force) (fear).**
or
 - (unconscious) (physically powerless).**
or
 - incapable of giving consent because of mental deficiency or disease, which condition was (known by) (reasonably apparent to) the defendant.**
or
 - incapable of giving consent because of the effect of any (alcoholic beverage) (narcotic) (drug) (other substance), which condition was (known by) (reasonably apparent to) the defendant.**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5505(b)(1), (2), and (3). Aggravated sexual battery is a severity level 5, person felony.

Except as provided in K.S.A. 21-5505(b)(3), it is not a defense that the defendant did not know or have reason to know that the alleged victim was not consenting to the touching, was overcome by force, or fear, or was unconscious or physically powerless.

In the event the charging document limits the sexual desires to those of one—the defendant or another person—the trial court should consider modifications to the instruction.

Comment

In *State v. Wallin*, 52 Kan. App. 2d 256, 366 P.3d 651 (2016) *rev. denied* 305 Kan. 1257 (2017), the Court of Appeals found that in a prosecution for rape, aggravated criminal sodomy, or aggravated sexual battery, the victim's incapacity to give consent because of mental deficiency or disease may be proved, depending on the facts of the case, without expert testimony.

Before July 1, 2011 Revisions to Criminal Code

Aggravated sexual battery is not a lesser included crime of rape. *State v. Gibson*, 246 Kan. 298, 787 P.2d 1176 (1990).

Aggravated sexual battery is not a lesser included offense of indecent liberties with a child. *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989).

Aggravated sexual battery is not a lesser included offense of aggravated criminal sodomy. *State v. Damewood*, 245 Kan. 676, 783 P.2d 1249 (1989).

The State does not need to prove that the victim was physically harmed or that the victim had no freedom of movement to prove that the touching was not consensual. *State v. Blount*, 13 Kan. App. 2d 347, 770 P.2d 852 (1989).

The Court of Appeals in *Blount* also held that the failure of K.S.A. 21-3518—Aggravated Sexual Battery—to define lack of consent does not make the statute unconstitutionally vague because a person of ordinary intelligence could readily understand what constitutes lack of consent.

55.110

INDECENT LIBERTIES WITH A CHILD

The defendant is charged with indecent liberties with a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant engaged in lewd fondling or touching of insert initials of child.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (insert initials of child and the defendant).

OR

1. The defendant submitted to lewd fondling or touching of (himself) (herself) by insert initials of child.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (insert initials of child and the defendant).

OR

1. The defendant solicited insert initials of child to engage in lewd fondling or touching of another.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (another).
3. At the time of the act, insert initials of child was 14 or 15 years old. The State need not prove the defendant knew the child's age.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Lewd fondling or touching" means fondling or touching in a manner which tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person. Lewd fondling or touching does not require contact with the sex organ of one or the other.

Notes on Use

For authority, see K.S.A. 21-5506(a).

Indecent liberties with a child is a severity level 5, person felony.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), the Supreme Court construed the meaning to be given to the words "lewd fondling or touching" under the provisions of K.S.A. 21-3503 and held that the statute did not require the State to prove a lewd fondling or touching of the *sexual organs* of the child or the offender as an element of the crime.

Time is not an indispensable ingredient of the offense of indecent liberties with a child if the offense was committed within the statute of limitations, and the defendant's defense was not prejudiced by the allegation concerning the date of the crime. See *State v. Wonser*, 217 Kan. 406, 537 P.2d 197 (1975); and *State v. Kilpatrick*, 2 Kan. App. 2d 349, 578 P.2d 1147 (1978).

In *State v. Crossman*, 229 Kan. 384, 387, 624 P.2d 461 (1981), the Kansas Supreme Court held that ". . . in cases of crimes involving illicit sexual relations or acts between an adult and a child, evidence of prior acts of similar nature between the same parties is admissible independent of K.S.A. 60-455 where the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged."

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties. In 1992, the Legislature deleted subsection (1)(b) from K.S.A. 21-3503; therefore, these offenses are no longer identical. Both Criminal sodomy, K.S.A. 21-3505, and Aggravated indecent liberties with a child, K.S.A. 21-3504, include sexual relations with a child at least 14 but less than 16 years of age. However, K.S.A. 21-3504 specifies "sexual intercourse" while K.S.A. 21-3505 includes oral or anal sexual relations.

In *State v. Dinh Loc Ta*, 296 Kan. 230, 230-31, Syl. ¶ 5, 290 P.3d 652 (2012), the Supreme Court found that in considering if a touching meets the definition of "lewd fondling or touching," a factfinder should consider whether the touching tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person, but defendant's mental state should not be used to define or determine whether the touching or fondling is lewd. Any contrary language in *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), was overruled.

In *State v. Warren*, 295 Kan. 629, 285 P.3d 1036 (2012), the Supreme Court held that evidence that a defendant touched his own penis was insufficient to establish that the defendant

"submitted to" lewd fondling or touching. The defendant's action of touching his own penis in order to expose his penis to a child did not satisfy the element of lewd fondling or touching.

Aggravated sexual battery is not a lesser included offense of indecent liberties with a child. *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989); and *State v. Damewood*, 245 Kan. 676, 783 P.2d 1249 (1989).

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

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55.120

**AGGRAVATED INDECENT LIBERTIES—
CHILD 14 OR 15 YEARS OLD**

The defendant is charged with aggravated indecent liberties with a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant had sexual intercourse with insert initials of child.
2. The defendant acted intentionally, knowingly, or recklessly.
3. At the time of intercourse, insert initials of child was 14 or 15 years old. The State need not prove the defendant knew the child's age.

OR

1. The defendant engaged in lewd fondling or touching of insert initials of child.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child)(the defendant) (insert initials of child and the defendant).
3. At the time of the act, insert initials of child was 14 or 15 years old. The State need not prove the defendant knew the child's age.
4. Insert initials of child did not consent to the fondling or touching.

OR

1. The defendant submitted to lewd fondling or touching of (himself) (herself) by insert initials of child.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (insert initials of child and the defendant).
3. At the time of the act, insert initials of child was 14 or 15 years old. The State need not prove the defendant knew the child's age.
4. Insert initials of child did not consent to the fondling or touching.

OR

1. The defendant caused insert initials of child to engage in lewd fondling or touching of another.
 2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (another).
 3. At the time of the act, insert initials of child was 14 or 15 years old. The State need not prove the defendant knew the child's age.
 4. Insert initials of child did not consent to the fondling or touching.
4. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Lewd fondling or touching" means fondling or touching in a manner which tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person. Lewd fondling or touching does not require contact with the sex organ of one or the other.

Notes on Use

For authority, see K.S.A. 21-5506(b). Aggravated indecent liberties as described in K.S.A. 21-5506(b)(1) and (3) is a severity level 3, person felony. When the act is committed pursuant to subsection (b)(2), it is a severity level 4, person felony.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Element No. 2 in the first alternative is required because the definition of the crime for that alternative does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

Cases Construing Statutes in Effect Before July 1, 2011

In *State v. Kessler*, 276 Kan. 202, 73 P.3d 761 (2003), the court decided that convictions for two counts of aggravated indecent liberties with a child were not multiplicitous since they were committed separately at different times and places.

Battery is not a lesser included offense of aggravated indecent liberties with a child. *State v. Banks*, 273 Kan. 738, 46 P.3d 546 (2002).

In *State v. Taylor*, 33 Kan.App.2d 284, 101 P.3d 1283 (2004), *rev. denied* 279 Kan. 1010 (2005), the Court of Appeals held that K.S.A. 21-3504(a)(1) is constitutional.

The phrase "person of another" as used in K.S.A. 21-3504(a)(3)(B) refers to a person other than the victim or the defendant. *State v. Johnson*, 283 Kan. 649, 156 P.3d 596 (2007). Under the facts of *Johnson*, the court held that aggravated indecent solicitation of a child (K.S.A. 21-3511(a)) is not a lesser included offense of aggravated indecent liberties with a child as charged under K.S.A. 21-3504(a)(3)(B).

The holding in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004), is not violated where a child-victim testifies at trial via closed-circuit television, pursuant to K.S.A. 22-3434, provided the trial court (1) hears evidence and determines the procedure is necessary to protect the welfare of the child; (2) finds the child would be traumatized by the presence of the defendant; and (3) finds that the emotional distress suffered by the child in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. *State v. Blanchette*, 35 Kan. App. 2d 686, 134 P.3d 19, *rev. denied* 282 Kan. 792 (2006), *cert. denied*, 549 U.S. 1229, 127 S. Ct. 1302, 167 L. Ed. 2d 115 (2007).

In *State v. Dinh Loc Ta*, 296 Kan. 230, 230-31, Syl. ¶ 5, 290 P.3d 652 (2012), the Supreme Court found that in considering if a touching meets the definition of "lewd fondling or touching," a factfinder should consider whether the touching tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person, but defendant's mental state should not be used to define or determine whether the touching or fondling is lewd. Any contrary language in *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), was overruled.

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55.121

AGGRAVATED INDECENT LIBERTIES—CHILD LESS THAN 14

The defendant is charged with aggravated indecent liberties with a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant engaged in lewd fondling or touching of insert initials of child.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (insert initials of child and the defendant).

OR

1. The defendant submitted to lewd fondling or touching of (himself) (herself) by insert initials of child.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (insert initials of child and the defendant).

OR

1. The defendant caused insert initials of child to engage in lewd fondling or touching of another.
2. The defendant intended to arouse or satisfy the sexual desires of (insert initials of child) (the defendant) (another).
3. At the time of the act, insert initials of child was less than 14 years old. The State need not prove the defendant knew the child's age.
4. The defendant was 18 or more years old at the time the act occurred.
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Lewd fondling or touching" means fondling or touching in a manner which tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person. Lewd fondling or touching does not require contact with the sex organ of one or the other.

Notes on Use

For authority, see K.S.A. 21-5506(b)(3). Aggravated indecent liberties as described in K.S.A. 21-5506(b)(3) is a severity level 3, person felony. When the offender is 18 or more years old, aggravated indecent liberties with a child as described in this subsection is an off-grid, person felony. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 or more years old at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). "Where the defendant's age is an essential element of the crime, the defendant is entitled to have that element included in the jury instruction that enumerates the elements of the crime." The court errs if the question of the defendant's age is submitted to the jury in a special question on the verdict form rather than as one of the elements. *State v. Brown*, 298 Kan. 1040, Syl. ¶ 1, 318 P.3d 1005 (2014).

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Comment

Cases Construing Statutes in Effect Before July 1, 2011

In *State v. Kessler*, 276 Kan. 202, 73 P.3d 761 (2003), the court decided that convictions for two counts of aggravated indecent liberties with a child were not multiplicitous since they were committed separately at different times and places.

Battery is not a lesser included offense of aggravated indecent liberties with a child. *State v. Banks*, 273 Kan. 738, 46 P.3d 546 (2002).

In *State v. Taylor*, 33 Kan. App. 2d 284, 101 P.3d 1283 (2004), *rev. denied* 279 Kan. 1010 (2005), the Court of Appeals held that K.S.A. 21-3504(a)(1) is constitutional.

The phrase "person of another" as used in K.S.A. 21-3504(a)(3)(B) refers to a person other than the victim or the defendant. *State v. Johnson*, 283 Kan. 649, 156 P.3d 596 (2007). Under the facts of *Johnson*, the court held that aggravated indecent solicitation of a child (K.S.A. 21-3511(a)) is not a lesser included offense of aggravated indecent liberties with a child as charged under K.S.A. 21-3504(a)(3)(B).

The holding in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004), is not violated where a child-victim testifies at trial via closed-circuit television, pursuant to K.S.A. 22-3434, provided the trial court (1) hears evidence and determines the procedure is necessary to protect the welfare of the child; (2) finds the child would be traumatized by the presence of the defendant; and (3) finds that the emotional distress suffered by the child in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. *State v. Blanchette*, 35 Kan. App. 2d 686, 134 P.3d 19, *rev. denied* 282 Kan. 792 (2006), *cert. denied*, 549 U.S. 1229, 127 S. Ct. 1302, 167 L. Ed. 2d 115 (2007).

In *State v. Dinh Loc Ta*, 296 Kan. 230, 230-31, Syl. ¶ 5, 290 P.3d 652 (2012), the Supreme Court found that in considering if a touching meets the definition of "lewd fondling or touching," a factfinder should consider whether the touching tends to undermine the morals of a child and is

so clearly offensive as to outrage the moral senses of a reasonable person, but defendant's mental state should not be used to define or determine whether the touching or fondling is lewd. Any contrary language in *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), was overruled.

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55.130

**DEFENSE TO INDECENT LIBERTIES WITH A CHILD/
AGGRAVATED INDECENT LIBERTIES WITH A CHILD**

It is a defense to the charge of (indecent liberties with a child) (aggravated indecent liberties with a child) that at the time of the offense the child was married to the defendant.

Notes on Use

For authority, see K.S.A. 21-5506(e). With respect to a prosecution of indecent liberties with a child, this instruction should be given only when the defendant is charged under K.S.A. 21-5506(a)(1).

With respect to a prosecution of aggravated indecent liberties with a child, this instruction should be given only when the defendant is charged under K.S.A. 21-5506(b)(1), (b)(2)(A), or (b)(3)(A).

Pursuant to K.S.A. 21-5506(e), this defense is not applicable to prosecutions in which the defendant is charged with soliciting or causing the child to engage in any lewd fondling or touching of another person.

Kansas does not recognize a common-law marriage contract if either party to the marriage is under 18 years of age. See K.S.A. 23-2502.

Comment

Before July 1, 2011 Revisions to Criminal Code

For common-law marriages entered into prior to July 1, 2002, *State v. Sedlack*, 246 Kan. 305, 787 P.2d 709 (1990), and *State v. Wade*, 244 Kan. 136, 766 P.2d 811 (1989) held that the common-law rule that males aged 14 and females aged 12 have the capacity to form a common-law marriage is the rule in Kansas. The elements of common-law marriage are set forth in *State v. Johnson*, 216 Kan. 445, 448, 532 P.2d 1325 (1975).

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55.140

UNLAWFUL VOLUNTARY SEXUAL RELATIONS

**The defendant is charged with unlawful voluntary sexual relations.
The defendant pleads not guilty.**

To establish this charge, each of the following claims must be proved:

- 1. The defendant engaged in (sexual intercourse) (sodomy) (lewd fondling or touching) with insert initials of child.**
- 2. The defendant did so intentionally, knowingly, or recklessly.**
- 3. Insert initials of child voluntarily engaged in (sexual intercourse) (sodomy) (lewd fondling or touching) with the defendant.**
- 4. At the time of the act, insert initials of child was 14 or 15 years old. The State need not prove the defendant knew the child's age.**
- 5. The defendant was less than 19 years old and fewer than 4 years older than insert initials of child.**
- 6. Insert initials of child and the defendant were the only parties involved in the act.**
- 7. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5507. Under this statute, sexual intercourse is a severity level 8, person felony; sodomy is a severity level 9, person felony; and lewd fondling or touching is a severity level 10, person felony.

Element No. 2 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Comment

Before July 1, 2011 Revisions to Criminal Code

K.S.A. 21-3522 provides that this charge applies only when the parties involved are members of the opposite sex. However, in *State v. Limon*, 280 Kan. 275, 122 P.3d 22 (2005), the Kansas Supreme Court determined that the statutory language "and are members of the opposite sex" violated the equal protection provisions of the United States and Kansas Constitutions. The opinion observes that teenagers of the same sex who engage in unlawful voluntary sexual relations are punished more harshly than teenagers of the opposite sex who engage in similar conduct. The opinion further held that the equal protection violation inherent in K.S.A. 21-3522 is cured by the severance of the words "and are members of the opposite sex" from the statute.

The plain language of K.S.A. 21-3522(a) requires the offender to be older than the victim. *In re E.R.*, 40 Kan. App. 2d 986, 197 P.3d 870 (2008).

55.150

INDECENT SOLICITATION OF A CHILD

The defendant is charged with indecent solicitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (enticed) (commanded) (invited) (persuaded) (attempted to persuade) insert initials of child to (commit) (submit to) an act of (rape) (indecent liberties with a child) (aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery).

OR

1. The defendant, with the intent to commit (rape) (indecent liberties with a child) (aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) upon or with insert initials of child, (enticed) (commanded) (invited) (persuaded) (attempted to persuade) insert initials of child to enter a (vehicle) (building) (room) (secluded place).
2. At the time of the act, insert initials of child was 14 or 15 years old. The State need not prove the defendant knew the child's age.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

(Rape) (Indecent liberties with a child) (Aggravated indecent liberties with a child) (Criminal sodomy) (Aggravated criminal sodomy) (Lewd and lascivious behavior) (Sexual battery) (Aggravated sexual battery) means: insert appropriate definition from PIK 4th 55.020.

Notes on Use

For authority, see K.S.A. 21-5508(a). Indecent solicitation of a child is a severity level 6, person felony.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Comment

Before July 1, 2011 Revisions to Criminal Code

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to the child's age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979); *State v. Lowden*, 38 Kan. App. 2d 858, 174 P.3d 895 (2008).

The only difference between the crimes of indecent solicitation of a child and aggravated indecent solicitation of a child is the age of the child. Aggravated indecent solicitation under K.S.A. 21-3511(a) is a specific intent crime. *State v. Brown*, 291 Kan. 646, 655, 244 P.3d 267 (2011).

55.160

AGGRAVATED INDECENT SOLICITATION OF A CHILD

The defendant is charged with aggravated indecent solicitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (enticed) (commanded) (invited) (persuaded) (attempted to persuade) insert initials of child to (commit) (submit to) insert unlawful sexual act.

OR

1. The defendant, with the intent to commit insert unlawful sexual act upon or with insert initials of child, (enticed) (commanded) (invited) (persuaded) (attempted to persuade) insert initials of child to enter a (vehicle) (building) (room) (secluded place).
2. At the time of the act, insert initials of child was less than 14 years old. The State need not prove the defendant knew the child's age.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

(Rape) (Indecent liberties with a child) (Aggravated indecent liberties with a child) (Criminal sodomy) (Aggravated criminal sodomy) (Lewd and lascivious behavior) (Sexual battery) (Aggravated sexual battery) means: insert appropriate definition from PIK 4th 55.020.

Notes on Use

For authority, see K.S.A. 21-5508(b). Aggravated indecent solicitation of a child is a severity level 5, person felony. The list of unlawful sexual acts that may be inserted in the blank in Element No. 1 can be found in K.S.A. 21-5501(d). The only difference between the crimes of indecent solicitation of a child and aggravated indecent solicitation of a child is in the age of the child.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

Comment

Before July 1, 2011 Revisions to Criminal Code

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to the child's age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

The phrase "person of another" as used in K.S.A. 21-3504(a)(3)(B) refers to a person other than the victim or the defendant. *State v. Johnson*, 283 Kan. 649, 156 P.3d 596 (2007). Under the facts of *Johnson*, the court held that aggravated indecent solicitation of a child (K.S.A. 21-3511(a)) is not a lesser included offense of aggravated indecent liberties with a child as charged under K.S.A. 21-3504(a)(3)(B).

Aggravated indecent solicitation under K.S.A. 21-3511(a) is a specific intent crime. *State v. Brown*, 291 Kan. 646, 655, 244 P.3d 267 (2011).

55.170

ELECTRONIC SOLICITATION OF A CHILD

The defendant is charged with electronic solicitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant by means of communication conducted through the telephone, internet, or by other electronic means (enticed) (solicited) insert initials of child to (commit) (submit to) an act of (rape) (indecent liberties with a child) (aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery).**
- 2. The defendant did so intentionally, knowingly, or recklessly.**
- 3. Insert initials of child or name of person solicited was a person whom the defendant believed was (less than 14 years old) (14 or 15 years old).**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The act of (rape) (indecent liberties with a child) (aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: insert appropriate definition from PIK 4th 55.020.

Notes on Use

For authority, see K.S.A. 21-5509. Electronic solicitation is a level 1, person felony if the act is committed upon a person the offender believes is less than 14 years old. It is a severity level 3, person felony if the act is committed upon a person the offender believes is less than 16 years old.

As used in this instruction, "communication conducted through the internet or by other electronic means" includes, but is not limited to, e-mail, chatroom chats, and text messaging.

Element No. 2 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

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55.180

SEXUAL EXPLOITATION OF A CHILD

The defendant is charged with sexual exploitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant, with the intent to promote a performance, (employed) (used) (persuaded) (induced) (enticed) (coerced) insert initials of child to engage in sexually explicit conduct.
2. Insert initials of child was less than 18 years old at the time the conduct occurred. The State need not prove the defendant knew the child's age.

OR

1. The defendant, with the intent to promote a performance, (employed) (used) (persuaded) (induced) (enticed) (coerced) insert name to engage in sexually explicit conduct.
2. The defendant believed that insert name was less than 18 years old at the time the conduct occurred.

OR

1. The defendant, with the intent to promote a performance, (employed) (used) (persuaded) (induced) (enticed) (coerced) insert initials of child to engage in sexually explicit conduct.
2. Insert initials of child was less than 14 years old at the time the conduct occurred. The State need not prove the defendant knew the child's age.

OR

1. The defendant possessed a visual depiction in which a person is (shown) (heard) engaging in sexually explicit conduct.
2. The defendant did so with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the defendant or another person.
3. The person (shown) (heard) engaging in sexually explicit conduct was less than 18 years old. The State need not prove the defendant knew the child's age.

OR

1. The defendant is a (parent) (guardian) (other person having custody or control) of insert initials of child.
2. The defendant knowingly permitted insert initials of child to engage in, or assist another to engage in, sexually explicit conduct.
3. The defendant did so (with the intent to promote a performance) (with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the defendant or another person).
4. Insert initials of child was less than 18 years old.

OR

1. The defendant promoted a performance, knowing its character and content.
2. The performance included sexually explicit conduct by a person.
3. The person engaging in sexually explicit conduct was less than 18 years old. The State need not prove the defendant knew the child's age.

OR

1. The defendant promoted a performance, knowing its character and content.
2. The performance included sexually explicit conduct by a person.
3. The defendant believed the person engaging in sexually explicit conduct was less than 18 years old.

OR

1. The defendant promoted a performance, knowing its character and content.
2. The performance included sexually explicit conduct by a person.
3. The person engaging in the sexually explicit conduct was less than 14 years old. The State need not prove the defendant knew the child's age.
4. The defendant was 18 or more years old at the time.

3. or 4. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

These definitions apply to this instruction:

"Sexually explicit conduct" means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sadomasochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.

"Promoting" means procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting, or advertising, for pecuniary profit or with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the defendant or another person.

"Performance" means any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk, computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk, or any play or other live presentation.

"Nude" means any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.

"Visual depiction" means any photograph, film, video picture, digital or computer-generated image or picture, whether made or produced by electronic, mechanical or other means.

Notes on Use

For authority, see K.S.A. 21-5510. Sexual exploitation of a child is a severity level 5, person felony. Sexual exploitation of a child as described in K.S.A. 21-5510(a)(1) or (a)(4) when the defendant is 18 or more years old and the victim less than 14 years old is an off-grid, person felony. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 or more years old at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). "Where the defendant's age is an essential element of the crime, the defendant is entitled to have that element included in the jury instruction that enumerates the elements of the crime." The court errs if the question of the defendant's age is submitted to the jury in a special question on the verdict form rather than as one of the elements. *State v. Brown*, 298 Kan. 1040, Syl. ¶ 1, 318 P.3d 1005 (2014).

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

In the event the charging document limits the sexual desires to those of one—the defendant or another person—the trial court should consider modifications to the instruction.

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require modification of the instruction.

This offense does not apply to possession of a visual depiction of a child in a state of nudity when the person who possesses the visual depiction is the child who is the subject of the visual depiction. K.S.A. 21-5510(e). For a definition of the phrase "state of nudity," see K.S.A. 21-5611(g)(2).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001), the Kansas Supreme Court held that K.S.A. 21-3516 is not unconstitutionally overbroad. The Kansas Supreme Court held that the words "exhibition in the nude" do not make the statute unconstitutionally broad when read in conjunction with the surrounding language. In *State v. Coburn*, 32 Kan. App. 2d 657, 87 P.3d 348 (2004), the Court held that the phrase "exhibition in the nude" means more than mere nudity and encompasses a child's awareness so that the depiction is posed, displayed, or presented for public view.

For a definition of the word "lewd," see *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977).

Possessing a floppy disk containing two or more sexually explicit images of a minor is a single act and cannot be divided into two or more distinct acts for prosecution. *State v. Donham*, 29 Kan. App. 2d 78, 24 P.3d 750 (2001).

Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

55.181

INTERNET TRADING IN CHILD PORNOGRAPHY

The defendant is charged with internet trading in child pornography. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant possessed a visual depiction in which a person is (shown) (heard) engaging in sexually explicit conduct.**
- 2. The defendant did so with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the defendant or another person.**
- 3. The person (shown) (heard) engaging in sexually explicit conduct was less than 18 years old. The State need not prove the defendant knew the child's age.**
- 4. The defendant knowingly caused or permitted the visual depiction to be viewed, by use of any electronic device connected to the internet, by any person other than the defendant or a person in the visual depiction.**
- 5. The defendant was 18 or more years old at the time.**
- 6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

These definitions apply to this instruction:

"Sexually explicit conduct" means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sadomasochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.

"Nude" means any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.

"Visual depiction" means any photograph, film, video picture, digital or computer-generated image or picture, whether made or produced by electronic, mechanical or other means.

Notes on Use

For authority, see K.S.A. 21-5514. Internet trading in child pornography is a severity level 5, person felony. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 or more years old at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). "Where the defendant's age is an essential element of the crime, the defendant is entitled to have that element included in the jury instruction that enumerates the elements of the crime." The court errs if the question of the defendant's age is submitted to the jury in a special question on the verdict form rather than as one of the elements. *State v. Brown*, 298 Kan. 1040, Syl. ¶ 1, 318 P.3d 1005 (2014).

Prosecution under K.S.A. 21-5514 is not available if K.S.A. 21-5610 or 21-5611 applies.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

With internet trading in child pornography, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or (5) the visual depiction may be viewed by any person other than the defendant using any electronic device connected to the internet and is viewed by a law enforcement officer using an electronic device connected to the internet while engaged in such officer's official duties; or (6) as otherwise provided by law. See K.S.A. 22-2619(b) and K.S.A. 21-5514(e). This may require modification of the instruction.

This offense does not apply to possession of a visual depiction of a child in a state of nudity when the person who possesses the visual depiction is the child who is the subject of the visual depiction. K.S.A. 21-5510(e). For a definition of the phrase "state of nudity," see K.S.A. 21-5611(g)(2). For a definition of "the internet," see K.S.A. 66-2011.

55.182

**AGGRAVATED INTERNET TRADING
IN CHILD PORNOGRAPHY**

The defendant is charged with aggravated internet trading in child pornography. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant, with the intent to promote a performance, (employed) (used) (persuaded) (induced) (enticed) (coerced) insert initials of child to engage in sexually explicit conduct.
2. Insert initials of child was less than 18 years old at the time the conduct occurred. The State need not prove the defendant knew the child's age.

OR

1. The defendant, with the intent to promote a performance, (employed) (used) (persuaded) (induced) (enticed) (coerced) insert name to engage in sexually explicit conduct.
2. The defendant believed that insert name was less than 18 years old at the time the conduct occurred.

OR

1. The defendant, with the intent to promote a performance, (employed) (used) (persuaded) (induced) (enticed) (coerced) insert initials of child to engage in sexually explicit conduct.
2. Insert initials of child was less than 14 years old at the time the conduct occurred. The State need not prove the defendant knew the child's age.

OR

1. The defendant promoted a performance, knowing its character and content.
2. The performance included sexually explicit conduct by a person.
3. The person engaging in sexually explicit conduct was less than 18 years old. The State need not prove the defendant knew the child's age.

OR

1. The defendant promoted a performance, knowing its character and content.
2. The performance included sexually explicit conduct by a person.
3. The defendant believed the person engaging in sexually explicit conduct was less than 18 years old.

OR

1. The defendant promoted a performance, knowing its character and content.
2. The performance included sexually explicit conduct by a person.
3. The person engaging in the sexually explicit conduct was less than 14 years old. The State need not prove the defendant knew the child's age.

3. or 4. The defendant was 18 or more years old at the time.

4. or 5. The defendant knowingly caused or permitted the performance to be viewed, by use of any electronic device connected to the internet, by any person other than the defendant or a person depicted in the performance.

5. or 6. or 7. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

These definitions apply to this instruction:

"Sexually explicit conduct" means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sadomasochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.

"Promoting" means procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting, or advertising, for pecuniary profit or with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the defendant or another person.

"Performance" means any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk, computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk, or any play or other live presentation.

"Nude" means any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.

Notes on Use

For authority, see K.S.A. 21-5514. Aggravated trading in child pornography is a severity level 5, person felony. Sexual exploitation of a child as described in K.S.A. 21-5514 and 21-5510(a)(1) or (a)(4) when the defendant is 18 or more years old and the victim is less than 14 years old is an off-grid, person felony. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 or more years old at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). "Where the defendant's age is an essential element of the crime, the defendant is entitled to have that element included in the jury instruction that enumerates the elements of the crime." The court errs if the question of the defendant's age is submitted to the jury in a special question on the verdict form rather than as one of the elements. *State v. Brown*, 298 Kan. 1040, Syl. ¶ 1, 318 P.3d 1005 (2014).

Prosecution under K.S.A. 21-5514 is not available if K.S.A. 21-5610 or 21-5611 applies.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

In the event the charging document limits the sexual desires to those of one—the defendant or another person—the trial court should consider modifications to the instruction.

With internet trading and aggravated trading in child pornography, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or (5) the performance may be viewed by any person other than the defendant using any electronic device connected to the internet and is viewed by a law enforcement officer using an electronic device connected to the internet while engaged in such officer's official duties; or (6) as otherwise provided by law. See K.S.A. 22-2619(b) and K.S.A. 21-5514 (e). This may require modification of the instruction.

When the child is under 14 years of age it is not an off-grid felony for attempting, conspiracy to commit, or criminal solicitation to commit the crime of aggravated internet trading in child pornography. K.S.A. 21-5514(d)(1), (2) and (3).

For a definition of "internet," see K.S.A. 66-2011.

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55.190

UNLAWFUL SEXUAL RELATIONS

The defendant is charged with unlawful sexual relations. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant engaged in consensual (sexual intercourse) (lewd fondling or touching) (sodomy) with insert name.
2. The defendant and insert name were not married.
3. The defendant was (an employee or volunteer of the Department of Corrections) (a contractor who was under contract to provide services in a correctional institution).
4. Insert name was 16 or more years old and was an inmate.

OR

3. The defendant was a (parole officer) (volunteer for the Department of Corrections) (employee or volunteer of a contractor who was under contract to provide supervision services for persons on parole, conditional release or post-release supervision).
4. Insert name was 16 or more years old and had been released on (parole) (conditional release) (post-release supervision).
5. The defendant knew, at the time of the act, that insert name was an inmate who had been released and was on (parole) (conditional release) (post-release supervision).

OR

3. The defendant was (a law enforcement officer) (an employee of a jail) (an employee of a contractor who was under contract to provide services in a jail).
4. Insert name was 16 or more years old and was confined to such jail.

OR

3. The defendant was (a law enforcement officer) (an employee of a juvenile detention facility or sanctions house) (an employee of a contractor who was under contract to provide services in a juvenile detention facility or sanctions house).
4. Insert name was 16 or more years old and was confined to such facility or sanctions house.

OR

3. The defendant was an employee of (the department of corrections) (a contractor who was under contract to provide services in a juvenile correctional facility).
4. Insert name was 16 or more years old and was confined to such facility.

OR

3. The defendant was an employee of (the department of corrections) (a contractor who was under contract to provide direct supervision and offender control services to the department of corrections).
4. Insert name was 16 or more years old and was insert one of the following:
 - released on conditional release from a juvenile correctional facility under the supervision and control of the department of corrections or juvenile community supervision agency.
 - or
 - placed in the custody of the department of corrections under the supervision and control of the department of corrections or juvenile community supervision agency.
5. The defendant knew, at the time of the act, that insert name was under supervision.

OR

3. The defendant was (an employee of the Kansas department for aging and disability services or the Kansas department for children and families) (an employee of a contractor who was under contract to provide services in an aging and disability or children and families institution or to the Kansas department

for aging and disability services or the Kansas department for children and families).

4. *Insert name* was 16 or more years old and was (a patient in such institution) (in the custody of the secretary for aging and disability services or the secretary for children and families).

OR

3. The defendant was a (worker) (volunteer) (person) in a position of authority in a family foster home licensed by the department of health and environment.
4. *Insert name* was 16 or more years old and was a foster child placed in the care of the family foster home.

OR

3. The defendant was a (teacher) (person in a position of authority).
4. *Insert name* was 16 or more years old and was a student enrolled at the school where the defendant was employed.

OR

3. The defendant was (a court services officer) (an employee of a contractor who was under contract to provide supervision services for persons under court services supervision).
4. *Insert name* was 16 or more years old and had been placed on probation under the supervision and control of court services.
5. The defendant knew, at the time of the act, that *insert name* was under the supervision of court services.

OR

3. The defendant was (a community correctional services officer) (an employee of a contractor who was under contract to provide supervision services for persons under community corrections supervision).
4. *Insert name* was 16 or more years old and had been assigned to a community correctional services program under the supervision and control of community corrections.
5. The defendant knew, at the time of the act, that *insert name* was under the supervision of community corrections.

OR

3. The defendant was (a surety) (an employee of a surety).
4. Insert name was 16 or more years old and was the subject of a surety agreement or bail bond agreement with the surety.
5. The defendant knew, at the time of the act, that insert name was the subject of the surety agreement or bail bond agreement with the surety.

OR

3. The defendant was a law enforcement officer.
4. Insert name was 16 or more years old.
5. Insert name was interacting with the defendant insert one of the following:
 - during a traffic stop.
 - or
 - during a custodial interrogation.
 - or
 - during an interview in connection with an investigation.
 - or
 - while the defendant had insert name detained.

5. or 6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority and a list of definitions of terms used in this instruction, see K.S.A. 21-5512. A violation of K.S.A. 21-5512(a)(5) is a severity level 4, person felony. A violation of any of the other subsections is a level 5, person felony.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Under Executive Reorganization Order No. 41, the department of social and rehabilitation services was renamed the department for children and families, effective July 1, 2012.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Stout*, 34 Kan. App. 2d 83, 114 P.3d 989 (2005), the Court of Appeals held that french kissing can constitute lewd touching in a prosecution under K.S.A. 21-3520. Whether such contact is lewd is a question for the jury by considering the totality of the circumstances. The opinion further held that a broad dictionary definition of the term "morals" is error because it is not required by the Kansas pattern instructions for prosecutions under K.S.A. 21-3520 and it invades the province of the jury.

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55.200

LEWD AND LASCIVIOUS BEHAVIOR

The defendant is charged with lewd and lascivious behavior. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant publicly engaged in otherwise lawful (sexual intercourse) (sodomy) with knowledge or reasonable anticipation that the participants were being viewed by others.**

OR

- 1. The defendant (publicly exposed [his] [her] sex organ) (exposed [his] [her] sex organ in the presence of a person not [his] [her] spouse and who had not consented thereto) with the intent to arouse or gratify the sexual desires of the defendant or another.**
 - [2. The defendant committed the act in the presence of insert initials of child, a person less than 16 years old at the time the act was committed. The State need not prove the defendant knew the child's age.]**
- 2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5513. Lewd and lascivious behavior if committed in the presence of a person 16 or more years old is a class B, nonperson misdemeanor. Lewd and lascivious behavior if committed in the presence of a person less than 16 years old is a severity level 9, person felony. If the act under Element No. 1 is sexual intercourse, PIK 4th 55.010, Sexual Intercourse—Definition, should be given. If the act under Element No. 1 is sodomy, the definition of sodomy in PIK 4th 55.020, Sex Offenses—Definitions, should be given.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

In the event the charging document limits the sexual desires to those of one person—the child or the defendant—the trial court should consider modifications to the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy and is neither a lesser degree of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977); *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 307, 624 P.2d 964 (1981).

The crime of lewd and lascivious behavior was enlarged in 1983 to include the exposure of the sex organ in a public place.

Lewd and lascivious behavior is not a lesser included offense of rape or aggravated sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

In *State v. Brown*, 295 Kan. 181, 182, Syl. ¶ 7, 284 P.3d 977 (2012), the Supreme Court held that the phrase "of the offender or another" does not create alternative means of committing the crime of lewd and lascivious behavior.

56.010

ENDANGERING A CHILD

The defendant is charged with endangering a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly and unreasonably caused or permitted insert name to be placed in a situation in which there was a reasonable probability that insert name's life, body or health would be endangered.
2. Insert name was less than 18 years old.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

In determining if there was a reasonable probability that insert name's life, body, or health would be injured or endangered, you should consider along with other relevant factors:

1. the gravity of the threatened harm; and
2. the likelihood that harm to insert name would result or that (he) (she) would be placed in imminent peril.

"Likelihood" means more than a faint or remote possibility.

Notes on Use

For authority, see K.S.A. 21-5601(a). Endangering a child is a class A, person misdemeanor. See K.S.A. 21-5601(d) for exception based on good faith selection of spiritual means for treatment, cure, or care of a child.

In *State v. Cummings*, 297 Kan. 716, 305 P.3d 556 (2013), the Supreme Court held that to ensure that a defendant is not convicted of endangering a child under a standard that requires less culpability than the law requires, the clarifying language contained in the paragraph below the elements should be added to this instruction. If supported by the evidence, the jury should be instructed on the Legislature's or regulatory body's independent assessment that the conduct at issue is inherently perilous.

Comment

Before July 1, 2011 Revisions to Criminal Code

The constitutionality of the former law, K.S.A. 21-3608(1)(b), was upheld upon the finding that the purpose of the statute is to prevent people from placing children in situations where their lives and bodies are in imminent peril, and that the statute, given a common-sense interpretation, is not vague. *State v. Fisher*, 230 Kan. 192, 631 P.2d 239 (1981).

In *State v. Walker*, 244 Kan. 275, 768 P.2d 290 (1989), the Supreme Court held that the State is not required to prove that the defendant had any independent legal duty to the child.

In *State v. Sharp*, 28 Kan. App. 2d 128, 13 P.3d 29 (2000), the Court of Appeals held that giving the prior version of this instruction was reversible error. The prior version of the instruction did not include the language requiring that the jury find there was a "reasonable probability" of injury to the child.

Endangering a child is not a lesser included offense of child abuse. The Supreme Court has held that other than the age of the victim and the fact that each crime involves endangering a child, there is no commonality of elements and the two crimes are not different degrees of the same crime. *State v. Boyd*, 281 Kan. 70, 94, 127 P.3d 998 (2006).

56.020

AGGRAVATED ENDANGERING A CHILD

The defendant is charged with aggravated endangering a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant recklessly caused or permitted insert name to be placed in a situation in which insert name's life, body or health was endangered.

OR

1. The defendant caused or permitted such child to be in an environment where the defendant knew or reasonably should have known that any person was distributing, possessing with the intent to distribute, manufacturing, or attempting to manufacture any (methamphetamine) (analog of methamphetamine).

OR

1. The defendant caused or permitted such child to be in an environment where the defendant knew or reasonably should have known that drug paraphernalia or volatile, toxic or flammable chemicals were stored for the purpose of manufacturing or attempting to manufacture any (methamphetamine) (analog or methamphetamine).
2. Insert name was less than 18 years old.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5601(b). A violation of this statute is a severity level 9, person felony. It is defined as one of the "inherently dangerous" felonies by K.S.A. 21-5402.

For the definition of "manufacture" see K.S.A. 21-5701(i). For the definition of "drug paraphernalia" see K.S.A. 21-5701(f).

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56.030

DEFENSE TO ENDANGERING A CHILD

If the sole reason for the charge of endangering a child is that defendant relied upon or furnished treatment by spiritual means through prayer in lieu of medical treatment or remedial care of the child, it is a defense to the charge of endangering a child that the defendant in good faith selected and depended upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination.

Notes on Use

For authority, see K.S.A. 21-5601(d).

This instruction should be given only if the defendant is the parent or guardian of the child. If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be used.

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56.040

ABUSE OF A CHILD

The defendant is charged with abuse of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly (tortured) (cruelly beat) insert name.

OR

1. The defendant knowingly shook insert name which resulted in great bodily harm to insert name.

OR

1. The defendant knowingly inflicted cruel and inhuman physical punishment upon insert name.

2. Insert name was less than 18 years old.

OR

2. Insert name was less than 6 years old.

3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5602. Abuse of a child is a severity level 5, person felony. When the victim is less than 6 years old, it is a severity level 4, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Rodriguez*, 295 Kan. 1146, 1156, 289 P.3d 85 (2012), the Supreme Court found that PIK 3d 58.11 (now PIK 4th 56.040) does not make "shaking" and "great bodily harm" synonymous, and it correctly informs jurors that they have to find a causal relationship between the shaking and the great bodily harm.

PIK 3d 58.11 was deemed to be sufficient in *State v. Carr*, 265 Kan. 608, 617, 963 P.2d 421 (1998).

The words torture, beat, abuse, cruel punishment, or inhuman punishment are not so vague or indefinite as to be unenforceable as a penal statute. *State v. Fahy*, 201 Kan. 366, 440 P.2d 566 (1968).

Abuse of a child is not a lesser offense of aggravated battery and both may be separately charged in the same information, even though they arise out of the same episode or transaction. However, when a conviction is set aside, any new trial is limited to the crime originally charged or, if conviction was on a lesser included offense, the included crime of which the defendant was convicted. Other crimes proven in the first trial, and which could have been but were not charged or relied upon, may not be added as new charges in the new trial. A conviction on the lesser offense of criminal injury to persons which is later vacated because of the statute's unconstitutionality is a bar pursuant to K.S.A. 21-3108(2)(a) to a prosecution for abuse of a child. *In re Berkowitz*, 3 Kan. App. 2d 726, 602 P.2d 99 (1979).

In a felony-murder case, the proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide, following *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977). A charge of abuse of a child may meet the *Rueckert* test for merger into a charge of felony first-degree murder. In *State v. Brown*, 236 Kan. 800, 803, 696 P.2d 954 (1985), the Court stated: "We are not called upon, and do not here decide, whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder."

In *State v. Lucas*, 243 Kan. 462, 759 P.2d 90 (1988), *aff'd on rehearing* 244 Kan. 193, 767 P.2d 1308 (1989), the Court addressed the question left open in *Brown*. The Court concluded that a single instance of assaultive conduct cannot be the underlying felony justifying a charge of felony murder. Moreover, when a child dies from an act of assaultive conduct, prior acts of abuse cannot be used as the basis for charging felony murder. See also *State v. Prouse*, 244 Kan. 292, 297, 767 P.2d 1308 (1989).

In *Lucas*, the Court expressed concern that the *Rueckert* test for merger is misleading. The key is "whether the elements of the underlying felony are so distinct from the homicide so as not to be an ingredient of the homicide." 243 Kan. at 469.

After the *Lucas* and *Prouse* decisions, the Legislature amended K.S.A. 21-3401 to provide that felony murder includes a killing committed in the perpetration of abuse of a child. In 1993, the Legislature included abuse of a child in the list of inherently dangerous felonies for purposes of felony murder. See K.S.A. 21-3436. In *State v. Smallwood*, 264 Kan. 69, 955 P.2d 1209 (1998), the court held that a single instance of child abuse could be the underlying felony for a felony-murder conviction.

In *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991), the Supreme Court held K.S.A. 21-3609 to be constitutional and that it does not require proof of a specific intent to injure. On July 1, 1995, K.S.A. 21-3609 was amended by inserting the words, "shaking which results in great bodily harm." After this amendment, the court was asked in *State v. Carr*, 265 Kan. 608, to revisit the constitutionality of the statute and concluded that the statute was not vague.

The words "willfully torturing" in K.S.A. 21-3609 do not cause child abuse to be a specific intent crime. *State v. Bruce*, 255 Kan. 388, 874 P.2d 1165 (1994).

In *State v. Mercer*, 33 Kan. App. 2d 308, 317, 101 P.3d 732 (2004), the court of appeals affirmed the trial court's conviction of defendant for child abuse under K.S.A. 21-3609 after defendant contended that trial court erred in supplementing PIK 58.11 by defining the word "torture" for jurors. The appellate court ruled that because the definition offered by the trial court was the same definition offered by the Kansas Supreme Court in *State v. Bruce*, 255 Kan. 388, 874 P.2d 1165 (1994), the trial court's instructions were not misleading and did not constitute reversible error. The definition of "torture," as used by the Kansas Supreme Court in *Bruce*, is "[t]o inflict intense pain to body or mind for purposes of punishment."

Neither severity level 7 aggravated battery under K.S.A. 21-3414(a)(1)(C) nor battery under K.S.A. 21-3412 are lesser included offenses of abuse of a child under K.S.A. 21-3609. *State v. Alderete*, 285 Kan. 359, 172 P.3d 27 (2007).

For definitions of "torture," "cruel," and "inhuman," see *State v. Wilson*, 41 Kan. App. 2d 37, 200 P.3d 1283 (2008).

56.050

**CONTRIBUTING TO A CHILD'S MISCONDUCT
OR DEPRIVATION**

The defendant is charged with contributing to a child's (misconduct) (deprivation). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was a child less than 18 years old.
2. The defendant insert one of the following:
 - knowingly (caused) (encouraged) insert name to become or remain a child in need of care.
or
 - knowingly (caused) (encouraged) insert name to commit a traffic infraction.
or
 - knowingly (caused) (encouraged) insert name to commit an act which if committed by an adult would be a (felony) (misdemeanor).
or
 - knowingly (caused) (encouraged) insert name to purchase (a parimutuel ticket) (an interest in a parimutuel ticket).
or
 - knowingly (caused) (encouraged) insert name to illegally (purchase) (obtain) (attempt to purchase) (attempt to obtain) alcoholic liquor from any person.
or
 - failed to reveal upon inquiry by a uniformed or properly identified law enforcement officer engaged in the performance of such officer's duty, information the defendant had regarding a runaway, with intent to aid the runaway in avoiding detection or apprehension.
or

- (sheltered) (concealed) a runaway with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers.

3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Child in need of care means: (include appropriate definition from K.S.A. 38-2202(d)). Runaway means: (include appropriate definition from K.S.A. 21-5603(d)).

[The elements of insert crime are as follows: insert elements of crime .]

Notes on Use

For authority, see K.S.A. 21-5603. Contributing to a child's misconduct or deprivation is a class A, nonperson misdemeanor, except that causing or encouraging a child to commit an act which, if committed by an adult would be a felony, is a severity level 7, person felony and sheltering or concealing a runaway (with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers) is a severity level 8, person felony.

Where the defendant is charged with causing or encouraging a child to commit a criminal act, the elements of such crime should be set forth in the concluding portion of the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Ferris*, 19 Kan. App. 2d 180, 865 P.2d 1058 (1993), the Court of Appeals held that K.S.A. 21-3612(1)(a) was a "lesser included offense" of K.S.A. 21-3612(1)(f) and remanded the case for resentencing.

In *State v. VanHecke and Gault*, 28 Kan. App. 2d 778, 20 P.3d 1277 (2001), the Court of Appeals reversed the district court's dismissal of charges against two high school teachers who had become involved in consensual sexual relationships with their 17-year-old students. The court found that K.S.A. 21-3612 encompassed intentionally causing a child under the age of 18 to become a child in need of care, as defined by the CINC statutes. The court further found that the CINC code defines a "child in need of care" to include a person less than 18 years of age who has been sexually abused. The CINC code refers back to K.S.A. Chapter 21, Article 35, and 21-3602 (incest) and 21-3603 (aggravated incest) for a definition of sexual abuse. It should be noted that under *VanHecke*, sexual acts by any person with a 16- or 17-year-old may subject that person to criminal prosecution under K.S.A. 21-3612(a)(1).

However, the holding of *VanHecke* was negated by a 2002 amendment to K.S.A. 38-1502(c) which removed the language "regardless of the age of the child" from the statute. It was this language that the *VanHecke* court relied upon in reaching its decision.

56.060

INCEST

The defendant is charged with incest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (married) (engaged in sexual intercourse with) (engaged in sodomy with) insert name.
2. Insert name was a person 18 or more years old.
3. Insert name was known to the defendant to be related to the defendant as biological (parent) (child) (grandparent of any degree) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece).
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

(Sexual intercourse) (Sodomy) means: _____.

Notes on Use

For authority, see K.S.A. 21-5604(a). Incest is a severity level 10, person felony.

As required by the facts, reference should be made to PIK 4th 55.010, Sexual Intercourse—Definition, for a definition of sexual intercourse, or PIK 4th 55.020, Sex Offenses—Definitions, for a definition of sodomy.

It is the Committee's opinion that the words "otherwise lawful" as used in the statute are intended to distinguish this crime from other offenses and are not necessary in the instruction.

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56.070

AGGRAVATED INCEST

The defendant is charged with aggravated incest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant married insert name who was less than 18 years old.
2. The defendant knew that insert name was related to the defendant as ([biological] [adopted] [step]) ([child] [grandchild of any degree] [brother] [sister] [half-brother] [half-sister] [uncle] [aunt] [nephew] [niece]).

OR

1. The defendant insert one of the following:
 - engaged in (sexual intercourse) (sodomy) with insert name.
 - or
 - (engaged in lewd fondling or touching of the person of insert name) (submitted to lewd fondling or touching of [his][her] person by insert name) with the intent to arouse or to satisfy the sexual desires of either insert name or the defendant, or both.
2. Insert name was 16 or 17 years old.
3. The defendant knew that insert name was related to defendant as ([biological] [adopted] [step]) ([child] [grandchild of any degree] [brother] [sister] [half-brother] [half-sister] [uncle] [aunt] [nephew] [niece]).
3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5604(b). Aggravated incest is a severity level 7, person felony, except when it results from otherwise lawful sexual intercourse or sodomy with a person who is 16 or 17 years old. In that case, after July 1, 2012, the severity level depends on the victim's relationship to the offender. If the victim is the offender's biological, step or adoptive child it is a severity level 3 but if the victim is the offender's biological, step or adoptive grandchild of any degree, brother, sister, uncle, aunt, nephew or niece, it is a severity level 5.

As the facts require, reference should be made to PIK 4th 55.010, Sexual Intercourse—Definition, for a definition of sexual intercourse, or PIK 4th 55.020, Sex Offenses—Definitions, for a definition of sodomy.

It is the Committee's opinion that the words "otherwise lawful" are intended to distinguish this crime from other offenses and are not necessary in the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

Comprehensive amendments in 1993 to the statutes defining sex crimes defined sexual intercourse or sodomy with a child who is less than 16 years of age as crimes regardless of whether the defendant is related to the victim or not. In cases involving sexual intercourse, defendant is guilty of rape or aggravated indecent liberties, and in cases of sodomy, defendant is guilty of criminal sodomy or aggravated criminal sodomy, depending upon whether the child is under 14 years of age or is between 14 and 16 years of age. Aggravated incest under K.S.A. 21-3603(2)(A) now applies only to "otherwise lawful sexual intercourse or sodomy." Thus, it does not apply to sexual intercourse or sodomy with a child who is less than 16, since such conduct is unlawful. Nor does it apply to non-consensual sexual intercourse with a child who is between 16 and 18 years of age since that conduct is, respectively, rape or criminal sodomy. It applies only to consensual conduct with a child who is between 16 and 18 years of age. Thus, *State v. Sims*, 33 Kan. App. 2d 762, 108 P.3d 1007 (2005), held a parent was properly charged with rape of his child who was less than 14 years of age and could not be charged with aggravated incest. Decisions under former statutes, such as *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994), and *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), holding that parents could be charged with aggravated incest but not with forcible rape or indecent liberties with a child are not authoritative under current statutes. For a thorough analysis of the legislative history behind the 1993 changes to K.S.A. 21-3603, see *State v. Ippert*, 268 Kan. 254, 995 P.2d 858 (2000).

Lewd fondling or touching has been defined as: "fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person and which is done with a specific intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977). Also refer to PIK 3d 57.05, Indecent Liberties with a Child, Notes on Use.

The aggravated incest statute, K.S.A. 21-3603, is not applicable to the sexual relationship between a half-blood uncle and the minor daughter of a half-brother. *State v. Craig*, 254 Kan. 575, 867 P.2d 1013 (1994) (Overruling *State v. Reedy*, 44 Kan. 190, 24 Pac. 66 [1890]).

In *State v. McMullen*, 20 Kan. App. 2d 985, 894 P.2d 251 (1995), the Court of Appeals upheld the conviction of a mother for aiding and abetting aggravated sodomy and for aiding and abetting indecent liberties of her own child even though she could not be charged as a principal in those crimes.

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56.080

ABANDONMENT OF A CHILD

The defendant is charged with abandonment of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was a insert one of the following:**
 - (parent) (guardian) of insert name.**
 - or**
 - person to whom the care and custody of insert name had been entrusted.**
- 2. The defendant left insert name in a place where insert name may suffer because of neglect.**
- 3. The defendant left insert name with the intent to abandon the child.**
- 4. At the time insert name was less than 16 years old.**
- 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5605(a). Abandonment of a child is a severity level 8, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

The 2000 legislature amended K.S.A. 21-3604 to exempt from prosecution a parent who surrenders physical custody of an infant 45 days old or younger to any employee on duty at a fire station, city or county health department or medical care facility if such infant has not suffered bodily harm.

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56.090

AGGRAVATED ABANDONMENT OF A CHILD

The defendant is charged with aggravated abandonment of a child.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant was a insert one of the following:
 - (parent) (guardian) of insert name.
 - or
 - person to whom the care and custody of insert name had been entrusted.
2. The defendant left insert name in a place where insert name might suffer because of neglect.
3. The defendant left insert name with the intent to abandon insert name.
4. Insert name suffered great bodily harm because of the abandonment.
5. At the time insert name was less than 16 years old.
6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5605(b). Aggravated abandonment of a child is a severity level 5, person felony.

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56.100

NONSUPPORT OF A CHILD

The defendant is charged with nonsupport of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was (a biological parent) (an adoptive parent) of insert name who was less than 18 years old.**
- 2. The defendant without lawful excuse (failed) (neglected) (refused) to provide for the support and maintenance of insert name who was then in necessitous circumstances.**
- 3. The defendant did so intentionally, knowingly, or recklessly.**
- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

"Necessitous circumstances" means needing the necessities of life, which cover not only basic physical needs, things absolutely indispensable to human existence and decency, but those things also which are in fact necessary to the particular person left without support.

Notes on Use

For authority, see K.S.A. 21-5606(a)(1). Nonsupport of a child is a severity level 10, nonperson felony.

Element No. 3 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

Before July 1, 2011 Revisions to Criminal Code

One who is outside the state may be chargeable with nonsupport of a child within this state even though he or she did not know the child was within the state. *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918); *In re Fowles*, 89 Kan. 430, 131 Pac. 598 (1913).

It is no defense that the necessities of a child are provided by others. In a factual situation of the latter type, it would appear proper to instruct that "the children should be deemed to be in destitute or necessitous circumstances, if they would have been in such condition had they not been provided for by someone else." *State v. Wellman, supra*; *State v. Knetzer*, 3 Kan. App. 2d 673, 600 P.2d 160 (1979).

Evidence that the defendant failed to provide support during a period of time later than the period of time charged in the information is not admissible. *State v. Long*, 210 Kan. 436, 502 P.2d 810 (1972).

The omission from K.S.A. 21-3605(1) of the term "destitute" does not change existing case law that interprets the phrase "destitute or necessitous circumstances." *State v. Knetzer, supra*.

Necessitous circumstances was defined in *State v. Waller*, 90 Kan. 829, 136 Pac. 215 (1913), and was cited with approval in *State v. Knetzer, supra*. Compare with *State v. Selberg*, 21 Kan. App. 2d 610, 904 P.2d 1014 (1995).

In *State v. Selberg*, 21 Kan. App. 2d 610, 904 P.2d 1014 (1995), the Court of Appeals held that proof beyond a reasonable doubt that the child be in "necessitous circumstances" is required and that a conviction may not be supported solely by proving that a parent has failed to pay court-ordered support. Here, the trial court refused to permit the defendant to offer evidence that the child had independent means through a trust. The Court held that such refusal required reversal since such evidence was relevant to the issue of whether the failure to pay court-ordered support caused the child to be in "necessitous circumstances."

Prosecution under K.S.A. 21-3605(a)(1) may be based upon failure to meet a common law duty to support one's children and does not necessarily rest upon a failure to meet child support obligations issued by a divorce court. *State v. Filor*, 28 Kan. App. 2d 208, 13 P.3d 926 (2000).

56.110

NONSUPPORT OF A SPOUSE

The defendant is charged with nonsupport of a spouse. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was the (wife) (husband) of insert name.**
- 2. The defendant without just cause failed to provide for the support of insert name, who was in necessitous circumstances.**
- 3. The defendant did so intentionally, knowingly, or recklessly.**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

"Necessitous circumstances" means needing the necessities of life, which cover not only basic physical needs, things absolutely indispensable to human existence and decency, but those things also which are in fact necessary to the particular person left without support.

Notes on Use

For authority, see K.S.A. 21-5606(a)(2). Nonsupport of a spouse is a severity level 10, nonperson felony.

Element No. 3 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

Before July 1, 2011 Revisions to Criminal Code

If the support claim is founded upon a common-law marriage, an instruction should be given that common-law marriages are recognized in this State, and as to what is necessary to prove a common-law marriage. The basic elements of a common-law marriage are: (1) capacity of the parties to marry, (2) a present marriage agreement, and (3) a holding out of each other as husband and wife to the public. *Fleming v. Fleming*, 221 Kan. 290, 559 P.2d 329 (1977). The statute makes no reference to that type of marriage.

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56.120

**FURNISHING ALCOHOLIC LIQUOR OR CEREAL MALT
BEVERAGE TO A MINOR**

The defendant is charged with furnishing (alcoholic liquor) (cereal malt beverage) to a minor. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant recklessly, directly or indirectly, (bought alcoholic liquor for) (distributed alcoholic liquor to) insert name.**

OR

- 1. The defendant recklessly, directly or indirectly, (bought cereal malt beverage for) (distributed cereal malt beverage to) insert name.**

- 2. Insert name was less than 21 years old.**

- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5607(a). Furnishing alcoholic liquor or cereal malt beverage to a minor is a class B, person misdemeanor for which the minimum fine is \$200.

See K.S.A. 41-102 for definitions of alcoholic liquor and minor.

See K.S.A. 41-2701 for definition of cereal malt beverage.

K.S.A. 21-5607(g) exempts from prosecution under this statute the parents or legal guardians of a minor or ward who furnish cereal malt beverage to that minor or ward.

See PIK 4th 56.140, Furnishing Alcoholic Liquor or Cereal Malt Beverage to a Minor—Defense, for defense available to licensed retailer, club, drinking establishment or caterer.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Sampsel*, 268 Kan. 264, 997 P.2d 664 (2000), it was held that a minor who furnishes alcoholic beverages to another minor could be prosecuted under K.S.A. 21-3610. The court further held that the minor defendant was not entitled to an instruction on possession of alcoholic liquor as a lesser included offense.

56.130

**FURNISHING ALCOHOLIC BEVERAGES TO A MINOR
FOR ILLICIT PURPOSES**

The defendant is charged with furnishing alcoholic beverages to a minor for illicit purposes. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant directly or indirectly ([bought] [distributed]) ([a cereal malt beverage] [an alcoholic liquor]) ([for] [to]) insert name.
2. Insert name was less than 18 years old.
3. The defendant did so with the intent (to commit against insert name) (to [encourage] [induce] insert name to [commit] [participate in]) the crime of (set out the crime as defined in K.S.A. 21-5501 through 21-5513 or in K.S.A. 21-5604).
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5607(b). Furnishing alcoholic beverages to a minor for illicit purposes is a severity level 9, person felony.

For a definition of "cereal malt beverage," see K.S.A. 41-2701.

For a definition of "alcoholic liquor," see K.S.A. 41-102.

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56.140

**FURNISHING ALCOHOLIC LIQUOR OR CEREAL
MALT BEVERAGE TO A MINOR—DEFENSE**

It is a defense to the charge of furnishing (alcoholic liquor) (cereal malt beverage) to a minor that the defendant was a licensed retailer, club, drinking establishment or caterer, or holds a temporary permit, or an employee thereof; that the defendant sold the (alcoholic liquor) (cereal malt beverage) to the person with reasonable cause to believe that the person was 21 or more years old; and that to purchase the (alcoholic liquor) (cereal malt beverage), the minor exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document that reasonably appears to contain a photograph of the minor and purporting to establish that such minor was 21 or more years old.

Notes on Use

For authority, see K.S.A. 21-5607(f). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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56.150**UNLAWFULLY HOSTING MINORS CONSUMING ALCOHOL OR
CEREAL MALT BEVERAGES**

The defendant is charged with unlawfully hosting minors consuming alcohol. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant ([owned] [occupied] [procured]) ([a residence] [a building] [a structure] [a room] [any land]).**
- 2. The defendant recklessly permitted the (residence) (building) (structure) (room) (land) to be used in a manner that resulted in the possession or consumption of alcoholic liquor or cereal malt beverages there by a person less than 21 years old.**
- 3. This occurred about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5608. Unlawfully hosting minors consuming alcohol or cereal malt beverages is a class A, person misdemeanor of \$1,000.

For a definition of "cereal malt beverages," see K.S.A. 41-2701.

For a definition of "alcoholic liquor," see K.S.A. 41-102.

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56.160**BIGAMY**

The defendant is charged with bigamy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant entered into a marriage in the State of Kansas while married to another.**

OR

- 1. The defendant entered into a marriage in the State of Kansas with a person the defendant knew was the spouse of another.**

OR

- 1. The defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse while married to another at the time of the cohabitation.**

OR

- 1. The defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse whom the defendant knew was a spouse of another at the time of the cohabitation.**

- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5609(a). Bigamy is a severity level 10, nonperson felony.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

Before July 1, 2011 Revisions to Criminal Code

Annulment of the second (bigamous) marriage does not bar prosecution for bigamy. *State v. Fitzgerald*, 240 Kan. 187, 726 P.2d 1344 (1986).

56.170

DEFENSE TO BIGAMY

It is a defense to the charge of bigamy that at the time of the (marriage) (cohabitation) the defendant reasonably believed that the earlier marriage had been dissolved by (death) (divorce) (annulment).

This belief must have been based on circumstances which would have led a reasonable person to conclude that the earlier marriage had been dissolved.

Notes on Use

For authority, see K.S.A. 21-5609(c). This instruction should be given whenever there is evidence that the defendant believed an earlier marriage was dissolved. If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be used.

Comment

Before July 1, 2011 Revisions to Criminal Code

For discussion of "reasonable belief", see *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

Annulment of the second (bigamous) marriage does not bar prosecution for bigamy. *State v. Fitzgerald*, 240 Kan. 187, 726 P.2d 1344 (1986).

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56.180

PROMOTING TRAVEL SERVICES FOR CHILD EXPLOITATION

The defendant is charged with promoting travel services for child exploitation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly (sold) (offered for sale) travel services for a fee, commission, or other valuable consideration.**
- 2. The travel services included or facilitated travel for the purpose of any person engaging in (aggravated human trafficking of a minor) (sexual exploitation of a child) (commercial sexual exploitation of a child) (internet trading in child pornography) (aggravated internet trading in child pornography).**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The elements of the crime of (aggravated human trafficking of a minor) (sexual exploitation of a child) (commercial sexual exploitation of a child) (internet trading in child pornography) (aggravated internet trading in child pornography) are (set forth in Instruction No. _____) (as follows: _____).

"Travel services" means (1) transportation by air, sea, or ground, (2) hotel or any lodging accommodations, (3) a package tour, or (4) a voucher or coupon to be redeemed for future travel or accommodations.

Notes on Use

For authority, see K.S.A. 21-5612(a). Violation of this statute is a severity level 5, person felony. K.S.A. 21-5612(b).

The elements of the applicable offense listed in K.S.A. 21-5612(a) should be set forth in the concluding portion of the instruction.

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57.010

MANUFACTURING A CONTROLLED SUBSTANCE

The defendant is charged with unlawfully manufacturing a controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant manufactured insert name of controlled substance.
2. The defendant did so intentionally, knowingly, or recklessly.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:
 - (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
 - (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.
- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.

Notes on Use

For authority, see K.S.A. 21-5703(a). A violation of this statute is either a drug severity level 1 or 2 felony, depending on the facts. See K.S.A. 21-5703(b) for specifics. The definition of "manufacture" can be found in K.S.A. 21-5701(i).

Element No. 2 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Insert in the blank in Element No. 1 the appropriate controlled substance listed in the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113.

If a controlled substance analog is involved, see PIK 4th 57.050.

57.020

**DISTRIBUTING OR POSSESSING WITH
INTENT TO DISTRIBUTE A CONTROLLED
SUBSTANCE (SCHEDULE I-IV)**

The defendant is charged with unlawfully (distributing) (possessing with the intent to distribute) a controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (distributed insert name of controlled substance) (possessed insert name of controlled substance with intent to distribute).
2. The quantity of the insert name of controlled substance (distributed) (possessed with intent to distribute) was insert one of the following:
 - (less than 3.5 grams) (at least 3.5 grams but less than 100 grams) (at least 100 grams but less than 1 kilogram) (1 kilogram or more).
 - or
 - (less than 25 grams) (at least 25 grams but less than 450 grams) (at least 450 grams but less than 30 kilograms) (30 kilograms or more).
 - or
 - (less than 1 gram) (at least 1 gram but less than 3.5 grams) (at least 3.5 grams but less than 100 grams) (100 grams or more).
 - or
 - (fewer than ten dosage units) (at least ten dosage units but fewer than 100 dosage units) (at least 100 dosage units but fewer than 1,000 dosage units) (1,000 dosage units or more).

[3. The defendant (distributed the insert name of controlled substance) (possessed the insert name of controlled substance with the intent to distribute) within 1,000 feet of school property.]

3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[It is not a defense that the defendant was acting as an agent on behalf of any other party in a transaction involving a controlled substance, did not know the quantity of the controlled substance, or did not know the specific controlled substance involved.]

"Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

["School property" means property on which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 through 12. It is not required that school be in session or that classes are actually being held at the time of the alleged offense or that children must be present within the structure or on the property during the time of any alleged offense.]

Notes on Use

For authority, see K.S.A. 21-5705(a). Except as hereafter noted, violation of K.S.A. 21-5705(a) is a drug severity level 4 felony if the quantity of the material was less than 3.5 grams; drug level 3 felony if the quantity was at least 3.5 but less than 100 grams; drug level 2 felony if the quantity was at least 100 grams but less than 1 kilogram; and drug level 1 felony if the quantity was 1 kilogram or more.

Violation of this subsection with respect to material containing a quantity of marijuana is a drug severity level 4 felony if the quantity of the material was less than 25 grams; drug level 3 felony if the quantity was at least 25 but less than 450 grams; drug level 2 felony if the quantity

was at least 450 grams but less than 30 kilograms; and drug level 1 felony if the quantity was 30 kilograms or more.

Violation of this subsection with respect to material containing a quantity of heroin or methamphetamine is a drug severity level 4 felony if the quantity of the material was less than 1 gram; drug level 3 felony if the quantity was at least 1 but less than 3.5 grams; drug level 2 felony if the quantity was at least 3.5 but less than 100 grams; and drug level 1 felony if the quantity was 100 grams or more.

Violation of this subsection with respect to material containing any quantity of a controlled substance designated in K.S.A. 65-4105, 4107, 4109, or 4111, distributed by dosage unit is a drug severity level 4 felony if the number of dosage units was fewer than ten; drug level 3 felony if the number of dosage units was at least 10 but fewer than 100; drug level 2 felony if the number of dosage units was at least 100 but fewer than 1,000; and drug level 1 felony if the number of dosage units was 1,000 or more.

For any violation of K.S.A. 21-5705(a), the severity level of the offense shall be increased by one level if the controlled substance was distributed or possessed with the intent to distribute on or within 1,000 feet of any school property. In the appropriate circumstances, the bracketed language of the instruction should be used.

Insert the controlled substance specified in the charging document into the appropriate blanks.

The appropriate choice among the four alternatives in Element No. 2 should be selected by referring to the charging document and by reviewing the provisions of K.S.A. 21-5705(d).

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

If a controlled substance analog is involved, see PIK 4th 57.050.

K.S.A. 21-5705(e) creates an inference of possession with intent to distribute based upon quantities of controlled substances found in the possession of the defendant. See PIK 4th 57.022 for an instruction regarding this inference.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Castleberry*, 48 Kan. App. 2d 469, 486, 293 P.3d 757 (2013), the Court of Appeals held that the definition of "distribute" in PIK 3d 67.32, which is identical to the definition of "distribute" given in the current instruction, did not establish alternative means of committing the crime of distribution of methamphetamine. Actual and attempted transfer are not alternative means of committing the offense.

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57.021

CULTIVATING A CONTROLLED SUBSTANCE

The defendant is charged with unlawfully cultivating a controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant cultivated insert name of controlled substance.**
- 2. The defendant did so intentionally, knowingly, or recklessly.**
- 3. The number of insert name of controlled substance plants cultivated was (at least 5 but fewer than 50) (at least 50 but fewer than 100) (100 or more).**
- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

[It is not a defense that the defendant was acting as an agent on behalf of any other party in a transaction involving a controlled substance, did not know the quantity of the controlled substance, or did not know the specific controlled substance involved.]

"Cultivate" means the planting or promotion of growth of five or more plants that contain or can produce controlled substances.

Notes on Use

For authority, see K.S.A. 21-5705(c). Violation of K.S.A. 21-5705(c) is a drug severity level 3 felony if the number of plants cultivated was more than 4 but fewer than 50; a drug severity level 2 felony if the number of plants cultivated was at least 50 but fewer than 100; and a drug severity level 1 felony if the number of plants cultivated was 100 or more.

57.022

**CONTROLLED SUBSTANCES OR THEIR ANALOGS —
INFERENCE OF INTENT TO DISTRIBUTE FROM
QUANTITY POSSESSED**

If you find the defendant possessed (450 grams or more of marijuana) (3.5 grams or more of heroin) (3.5 grams or more of methamphetamine) (100 dosage units or more containing insert name of controlled substance) (100 grams or more of insert name of any other controlled substance), you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-5705(e).

57.030

**DISTRIBUTING OR POSSESSING WITH INTENT TO
DISTRIBUTE A CONTROLLED SUBSTANCE (SCHEDULE V)**

The defendant is charged with unlawfully (distributing) (possessing with intent to distribute) a controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (distributed insert name of controlled substance) (possessed insert name of controlled substance with intent to distribute).

OR

1. The defendant (distributed insert name of controlled substance) (possessed insert name of controlled substance with intent to distribute it) to insert name of person.
- [2. Insert name of person was less than 18 years old at the time.]
2. or 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[It is not a defense that the defendant was acting as an agent on behalf of any other party in a transaction involving a controlled substance, did not know the quantity of the controlled substance, or did not know the specific controlled substance involved.]

"Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-5705(b). Violation of K.S.A. 21-5705(b) is a class A nonperson misdemeanor, except it is a nondrug severity level 7 felony if the substance was distributed to or possessed with the intent to distribute to a child less than 18 years old. If the felony level of this crime is charged, the second alternative of Element No. 1 should be used together with bracketed Element No. 2.

The definitions used here can be found in K.S.A. 21-5701.

Insert in the blank in Element No. 1 the appropriate controlled substance listed in K.S.A. 65-4113.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

If a controlled substance analog is involved, see PIK 4th 57.050.

K.S.A. 21-5705(e) creates an inference of possession with intent to distribute based upon quantities of controlled substances found in the possession of the defendant. See PIK 4th 57.022 for an instruction regarding this inference.

57.040

POSSESSING A CONTROLLED SUBSTANCE

The defendant is charged with unlawfully possessing insert name of controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant possessed insert name of controlled substance.
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[It is not a defense that the defendant was acting as an agent on behalf of any other party in a transaction involving a (controlled substance) (controlled substance analog).]

"Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

[When a defendant is in nonexclusive possession of (the premises upon) (an automobile in) which a controlled substance is found, it cannot be inferred that the defendant knowingly possessed the controlled substance unless there are other circumstances linking the defendant to the controlled substance. You may consider all factors supported by the evidence in determining whether the defendant knowingly possessed the controlled substance, including the following:

1. whether the defendant previously participated in the sale of a controlled substance;
2. whether the defendant used controlled substances;
3. whether the defendant was near the area where the controlled substance was found;
4. whether the controlled substance was found in plain view;
5. whether the defendant made any incriminating statements;
6. whether the defendant's behavior was suspicious;
7. whether the defendant's personal belongings were near the controlled substance.]

Notes on Use

For authority, see K.S.A. 21-5706. Violation of K.S.A. 21-5706(a) is a drug severity level 5 felony. Pursuant to K.S.A. 21-5706(c)(2), unless the drug possessed is marijuana or tetrahydrocannabinol, violation of subsection (b) is a class A, nonperson misdemeanor. However, if the defendant has a prior conviction, violation of subsections (b)(1) through (b)(5) or subsection (b)(7) is a drug severity level 5 felony.

If the drug possessed is marijuana or tetrahydrocannabinol, a first offense is a class B, nonperson misdemeanor; a second offense is a class A, nonperson misdemeanor; and a third or subsequent offense is a drug severity level 5 felony. K.S.A. 21-5706(c)(3).

The definition of "possession" can be found in K.S.A. 21-5701(q).

When this statutory definition of possession was enacted in 2009, the committee concluded that it was meant to supplant the much expanded definition of possession previously found in PIK 3d 67.13-D, which was based largely on historical case law. Recent opinions of the Kansas appellate courts seem to indicate, however, that the previous list of nonexclusive possession factors survives the legislative change. *State v. Keel*, 302 Kan. 560, 357 P.3d 251, Syl. ¶ 2 (2015); *State v. Rosa*, 304 Kan. 429, 434, 371 P.3d 915 (2016). The committee has thus chosen to reinsert the list of nonexclusive possession factors into the above instruction for use when appropriate.

Insert in the blanks in the first paragraph and in Element No. 1 the appropriate controlled substance designated in K.S.A. 21-5706(a) or (b).

If a controlled substance analog is involved, see PIK 4th 57.050.

57.050

**CONTROLLED SUBSTANCE ANALOG—POSSESSION,
DISTRIBUTION, ETC.**

The defendant is charged with unlawfully (manufacturing) (cultivating) (distributing) (possessing with intent to distribute) (possessing) insert name of controlled substance analog. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert appropriate element(s) from PIK 4th 57.010, 57.020, 57.030, or 57.040, substituting the name of the analog in place of the controlled substance.
2. The insert name of controlled substance analog is intended for human consumption.
3. Insert one or more of the following:
 - The chemical structure of insert name of analog is substantially similar to the chemical structure of insert name of controlled substance.
 - or
 - Insert name of analog has a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to that of insert name of controlled substance.
 - or
 - The defendant (represented) (intended) that insert name of analog (has) (have) a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to that of insert name of controlled substance.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

["Cultivate" means the planting or promotion of growth of five or more plants that contain or can produce controlled substances.]

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.**
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:**
 - (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or**
 - (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.**
- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.]**

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-5701(b), 21-5703(a), 21-5705(a), (b), and (c), and 21-5706(a) and (b). The name of the controlled substance to be inserted in the appropriate blanks in Element Nos. 2 and 3, must be a substance contained in K.S.A. 65-4105 or 65-4107.

Depending on the prohibited act involved, the appropriate elements from PIK 4th 57.010, 57.020, 57.021, 57.030, or 57.040 should be added as part of Element No. 1 of this instruction.

The definitions used here can be found in K.S.A. 21-5701.

K.S.A. 21-5705(e) creates an inference of possession with intent to distribute based upon quantities of controlled substances found in the possession of the defendant. See PIK 4th 57.022 for an instruction regarding this inference.

57.060

**UNLAWFUL USE OF COMMUNICATION FACILITY TO
FACILITATE FELONY DRUG TRANSACTION**

The defendant is charged with unlawful use of a communication facility (in committing) (in causing or facilitating the commission of) (in an attempt to commit) (in a conspiracy to commit) (in the solicitation of) the felony of insert felony. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (intentionally) used a communication facility in (committing) (causing the actual commission of) (facilitating the actual commission of) insert the appropriate felony violation.

OR

1. The defendant (knowingly) (intentionally) used a communication facility in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the felony of insert the appropriate felony violation.

2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The elements of insert the appropriate felony violation are (set forth in Instruction No. ____) (as follows: _____).

"Communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes telephone, wire, radio, computer networks, beepers, pagers, and all means of communication.

["Attempt" means an overt act toward the perpetration of a crime done by a person who intends to commit the crime, but fails in the perpetration or is prevented or intercepted in executing the crime.]

["Conspiracy" means an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all the facts and circumstances.]

["Facilitate" means to aid, assist, or make easier fulfillment of a goal.]

["Solicitation" means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.]

Notes on Use

For authority, see K.S.A. 21-5707. A violation of K.S.A. 21-5707 is a nondrug severity level 8, nonperson felony.

The felony violations under K.S.A. 21-5703, 21-5705, and 21-5706 should be inserted in the second blank of Element No. 1 and the elements of the appropriate felony violation should be referred to or set forth in the concluding portion of the instruction.

The definition of "attempt" is derived from K.S.A. 21-5301(a), the definition of "conspiracy" is derived from K.S.A. 21-5302(a), and the definition of "solicitation" is derived from K.S.A. 21-5303(a).

57.070**UNLAWFULLY OBTAINING A PRESCRIPTION-ONLY DRUG**

The defendant is charged with unlawfully obtaining a prescription-only drug. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (made) (altered) (signed) a prescription order and the defendant was not a practitioner or mid-level practitioner at the time of the commission of the act.**

OR

- 1. The defendant distributed a prescription order, knowing it to have been (made) (altered) (signed) by a person other than a practitioner or mid-level practitioner.**

OR

- 1. The defendant possessed a prescription order with intent to distribute it and knowing it to have been (made) (altered) (signed) by a person other than a practitioner or mid-level practitioner.**

OR

- 1. The defendant possessed a prescription-only drug knowing it to have been obtained pursuant to a prescription order (made) (altered) (signed) by a person other than a practitioner or mid-level practitioner.**

OR

- 1. The defendant provided false information, with the intent to deceive, to a practitioner or mid-level practitioner for the purpose of obtaining a prescription-only drug.**

- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction, "practitioner" means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, optometrist licensed under the optometry law as a therapeutic licensee or diagnostic and therapeutic licensee, or scientific investigator, or other person authorized by law to use a prescription-only drug in teaching or chemical analysis or to conduct research with respect to a prescription-only drug.

As used in this instruction, "mid-level practitioner" means an advanced registered nurse practitioner issued a certificate of qualification who has authority to prescribe drugs pursuant to a written protocol with a responsible physician or a licensed physician's assistant who has authority to prescribe drugs pursuant to a written protocol with a responsible physician.

As used in this instruction, "prescription-only drug" means any drug whether intended for use by man or animal, required by federal or state law to be dispensed only pursuant to a written or oral prescription or order of a practitioner or restricted to use by practitioners only.

As used in this instruction, "prescription order" means an order transmitted in writing, orally, telephonically or by other means of communication for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order. A pharmacist means any natural person licensed to practice pharmacy.

Notes on Use

For authority, see K.S.A. 21-5708(a). Unlawfully obtaining or distributing a prescription-only drug is a class A, nonperson misdemeanor. If the defendant has a prior conviction under K.S.A. 21-5708 or K.S.A. 21-4214 (prior to its repeal), the present offense is a nondrug severity level 9, nonperson felony.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

57.080

UNLAWFULLY SELLING A PRESCRIPTION-ONLY DRUG

The defendant is charged with unlawfully selling a prescription-only drug. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant unlawfully obtained a prescription-only drug by insert appropriate part of PIK 4th 57.070 instruction.
2. The defendant (sold) (offered for sale) (possessed with intent to sell) that prescription-only drug.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Pharmacist" means any natural person registered to practice pharmacy.

"Practitioner" means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

"Prescription-only drug" means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription."

"Prescription order" means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order.

Notes on Use

For authority, see K.S.A. 21-5708(b), which applies to crimes committed after April 15, 2010. Unlawfully selling a prescription-only drug is a nondrug severity level 6, nonperson felony.

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57.090

**METHAMPHETAMINE COMPONENTS—POSSESSION
WITH INTENT TO MANUFACTURE**

The defendant is charged with possession of (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above) with intent to use the product to manufacture a controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant possessed (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above) with intent to use the product to manufacture a controlled substance.
2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:
 - (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

- (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.
- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.

"Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

Notes on Use

For authority, see K.S.A. 21-5709(a), a violation of which is a drug severity level 3 felony. The definitions used here can be found in K.S.A. 21-5701.

For persons arrested and charged under K.S.A. 21-5709(a), bail must be at least \$50,000 cash or surety unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision, or the defendant agrees to participate in a licensed or certified drug treatment program. K.S.A. 21-5709(f).

57.100

**DRUG PARAPHERNALIA—USE OR POSSESSION
WITH INTENT TO USE**

The defendant is charged with unlawfully (using drug paraphernalia) (possessing drug paraphernalia with intent to use it). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (used insert description of object) (possessed insert description of object with the intent to use it) as drug paraphernalia to insert one of the following:
 - manufacture, cultivate, plant, propagate, harvest, test, analyze, or distribute insert name of controlled substance.
 - or
 - store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body insert name of controlled substance.
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

["Cultivate" means the planting or promotion of growth of five or more plants that contain or can produce controlled substances.]

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.**
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:**
 - (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or**
 - (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.**
- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.]**

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-5709(b). The definitions used here can be found in K.S.A. 21-5701.

K.S.A. 21-5709(e)(2) provides that a violation based upon the first bulleted option of Element No. 1 is a drug severity level 5 felony, except that a violation is a class B nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants. However, this misdemeanor provision conflicts directly with K.S.A. 21-5701(c), which defines "cultivate" as the "planting or promotion of growth of five or more plants." Resolution of this conflict is beyond the purview of this committee; thus inclusion here of an instruction on misdemeanor use of drug paraphernalia to cultivate marijuana is not possible at this time.

Pursuant to K.S.A. 21-5701(c), an instruction on a felony charge that includes use or intended use of paraphernalia for cultivation of any controlled substance, including marijuana, must instruct the jury to determine whether five or more plants were involved. Thus, the bracketed definition of "cultivate" should be included in the instruction on such a charge.

A violation based on the second bulleted option of Element No. 1 is a class B misdemeanor. K.S.A. 21-5709(e)(3).

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Inapplicable words should be stricken from the appropriate bulleted option of Element No. 1.

PIK 4th 57.180 defining "drug paraphernalia" should be given. Only those objects in evidence that might be classified by K.S.A. 21-5701(f) as "drug paraphernalia" should be included in this instruction as well as PIK 4th 57.180.

PIK 4th 57.170 setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. PIK 4th 57.170 should include only those factors in K.S.A. 21-5711 supported by evidence.

57.110

**ANHYDROUS OR PRESSURIZED AMMONIA—NON-APPROVED
CONTAINER**

The defendant is charged with unlawfully [(using) (possessing with intent to use)] [(anhydrous) (pressurized) ammonia]. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant [(used) (possessed with intent to use)] [(anhydrous) (pressurized) ammonia] in a container not approved for that chemical by the Kansas department of agriculture.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-5709(c), a violation of which is a drug severity level 5 felony. K.S.A. 21-5709(d)(4). The definition of "possession" can be found in K.S.A. 21-5701(q).

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

For persons arrested and charged under K.S.A. 21-5709(c), bail must be at least \$50,000 cash or surety unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision, or the defendant agrees to participate in a licensed or certified drug treatment program. K.S.A. 21-5709(f).

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57.120

**METHAMPHETAMINE COMPONENTS—
UNLAWFULLY ACQUIRING**

The defendant is charged with unlawfully (purchasing) (receiving) (acquiring) at retail a (compound) (mixture) (preparation) containing pseudoephedrine base or ephedrine base. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (purchased) (received) (acquired) at retail a (compound) (mixture) (preparation) containing more than (3.6 grams of pseudoephedrine base or ephedrine base in any single transaction) (9 grams of pseudoephedrine base or ephedrine base within any 30-day period).**
- 2. The defendant did so intentionally, knowingly, or recklessly.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5709(d), violation of which is a class A nonperson misdemeanor.

Element No. 2 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

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57.130

**METHAMPHETAMINE COMPONENTS—MARKETING,
DISTRIBUTION, ETC. FOR USE IN MANUFACTURING**

The defendant is charged with unlawfully (advertising) (marketing) (labeling) (distributing) (possessing with intent to distribute) a product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (advertised) (marketed) (labeled) (distributed) (possessed with intent to distribute) a product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above).
2. The defendant knew or reasonably should have known that the purchaser would use the product to manufacture a controlled substance or controlled substance analog.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:
 - (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's

administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

- (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.**

- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.**

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-5710(a)(1), violation of which is a drug severity level 3 felony. K.S.A. 21-5710(e)(1). The definitions used here can be found in K.S.A. 21-5701.

57.140

**METHAMPHETAMINE COMPONENTS—MARKETING,
DISTRIBUTION, ETC. FOR NON-INDICATED USE**

The defendant is charged with unlawfully (advertising) (marketing) (labeling) (distributing) (possessing with intent to distribute) a product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (advertised) (marketed) (labeled) (distributed) (possessed with intent to distribute) a product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above).
2. The defendant did so for indication of (stimulation) (mental alertness) (weight loss) (appetite control) (energy) or other use not approved pursuant to federal law.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-5710(a)(2), violation of which is a drug severity level 3 felony. K.S.A. 21-5710(e)(1). The definitions used here can be found in K.S.A. 21-5701.

57.150

**DISTRIBUTION OF DRUG PARAPHERNALIA FOR USE IN
MANUFACTURING OR DISTRIBUTING
CONTROLLED SUBSTANCES**

The defendant is charged with (distributing drug paraphernalia) (causing drug paraphernalia to be distributed) (possessing drug paraphernalia with the intent to distribute it) (manufacturing drug paraphernalia with the intent to distribute it). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (distributed insert description of object) (caused insert description of object to be distributed) (possessed insert description of object with the intent to distribute it) (manufactured insert description of object with the intent to distribute it) as drug paraphernalia.
2. The defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (manufacture) (distribute) insert name of controlled substance or controlled substance analog.

OR

1. The defendant (distributed insert description of object) (caused insert description of object to be distributed) as drug paraphernalia to insert name of person.
2. The defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (manufacture) (distribute) insert name of controlled substance or controlled substance analog.
3. At the time, insert name of person was less than 18 years old.

OR

1. The defendant (distributed insert description of object) (caused insert description of object to be distributed) as drug paraphernalia.
2. The defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (manufacture) (distribute) insert name of controlled substance or controlled substance analog.
3. The defendant did so on or within 1,000 feet of school property.
3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:
 - (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

- (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.]
- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.]

["School property" means property on which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 through 12. It is not required that school be in session or that classes are actually being held at the time of the alleged offense or that children must be present within the structure or on the property during the time of any alleged offense.]

Notes on Use

For authority, see K.S.A. 21-5710(b). A violation of this statute is a drug severity level 5 felony, except that a violation within 1,000 feet of any school property or a violation in which the defendant distributes the substance or causes the substance to be distributed to a minor is a drug severity level 4 felony.

K.S.A. 21-5710(b) does not include the crime of possession. Between July 1, 2009 and June 30, 2010, there was no enhanced penalty for violation within 1,000 feet of school property. The definitions used here can be found in K.S.A. 21-5701.

When this instruction is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known or foreseeable by the defendant must be named. Pursuant to K.S.A. 21-5701(a), "controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113. The appropriate controlled substance should be inserted in the instruction.

PIK 4th 57.180, defining "drug paraphernalia," and PIK 4th 57.170, setting forth factors to be considered in determining whether an object is drug paraphernalia, should be given. Only those objects in evidence that might be classified by K.S.A. 21-5701(f) as "drug paraphernalia" should be included in this instruction and PIK 4th 57.180.

57.160

DISTRIBUTION OF DRUG PARAPHERNALIA FOR USE AS PARAPHERNALIA

The defendant is charged with unlawfully (distributing) (possessing with the intent to distribute) (manufacturing with the intent to distribute) drug paraphernalia. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (distributed insert description of object) (possessed insert description of object with the intent to distribute it) (manufactured insert description of object with the intent to distribute it) as drug paraphernalia.
2. The defendant knew or under the circumstances reasonably should have known that insert description of object (would be used) (was primarily intended) (was primarily designed) for use in any of the following: planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body insert name of controlled substance.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

OR

1. The defendant (distributed insert description of object) (possessed insert description of object with the intent to distribute it) (manufactured insert description of object with the intent to distribute it) as drug paraphernalia to insert name of person.
2. The defendant knew or under the circumstances reasonably should have known that insert description of object (would be used) (was primarily intended) (was primarily designed) for use in any of the following: planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting,

inhaling, or otherwise introducing into the human body insert name of controlled substance.

3. At the time, insert name of person was less than 18 years old.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

OR

1. The defendant (distributed insert description of object) (possessed insert description of object with the intent to distribute it) (manufactured insert description of object with the intent to distribute it) as drug paraphernalia to insert name of person.
2. The defendant did so on or within 1,000 feet of school property.
3. The defendant knew or under the circumstances reasonably should have known that insert description of object (would be used) (was primarily intended) (was primarily designed) for use in any of the following: planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body insert name of controlled substance.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.**
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:**
 - (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or**
 - (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.]**
- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.]**

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

["School property" means property on which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 through 12. It is not required that school be in session or that classes are actually being held at the time of the alleged offense or that children must be present within the structure or on the property during the time of any alleged offense.]

Notes on Use

For authority, see K.S.A.21-5710(c) and (d). Pursuant to K.S.A. 21-5710(e)(3) and (4), the penalty for violation of each of these subsections is enhanced if the defendant distributed the drug paraphernalia, or caused it to be distributed, on or within 1,000 feet of school property, or to a minor. Therefore, if these circumstances are alleged, the appropriate alternatives in the instruction should be given. The definitions used here can be found in K.S.A. 21-5701.

When this instruction is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known or foreseeable by the defendant must be named. Pursuant to K.S.A. 21-5701(a), "controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113.

PIK 4th 57.180, defining "drug paraphernalia" and PIK 4th 57.170, setting forth factors to be considered in determining whether an object is drug paraphernalia, should be given. Only those objects in evidence that might be classified by K.S.A. 2136a01(f) as "drug paraphernalia" should be included in this instruction and PIK 4th 57.180.

Inapplicable words should be stricken from Element No. 2 in the first two alternatives and Element No. 3 in the third alternative.

Between July 1, 2009 and June 30, 2010, the statute did not require that the defendant be 18 or older for an enhanced penalty, and after June 30, 2012 the statute does not require that the defendant be 18 or older for an enhanced penalty.

"Drug paraphernalia" does not include products, chemicals, or materials described in K.S.A. 21-5709(a).

57.170

DRUG PARAPHERNALIA—FACTORS TO BE CONSIDERED

In determining whether an object is drug paraphernalia, you shall consider, in addition to all other relevant factors, the following:

[Statements by (an owner) (a person in control) of the object concerning its use.]

[Prior convictions, if any, of (an owner) (a person in control) of the object, under any (state) (federal) law relating to any controlled substance.]

[The proximity of the object, in time and space, to a direct commission of a drug crime.]

[The proximity of the object to controlled substances.]

[The existence of any residue of controlled substances on the object.]

[(Direct) (circumstantial) evidence of the intent of (an owner) (a person in control) of the object, to deliver it to a person (the owner) (the person in control) of the object knows, or should reasonably know, intends to use the object to facilitate the commission of a drug crime. A finding that (the owner) (the person in control) of the object is innocent of directly committing a drug crime does not prevent a finding that the object is intended for use as drug paraphernalia.]

[(Oral) (written) instructions provided with the object concerning its use.]

[Descriptive materials accompanying the object which explain or depict its use.]

[National and local advertising concerning the object's use.]

[The manner in which the object is displayed for sale.]

[Whether (the owner) (the person in control) of the object is a legitimate supplier of similar or related items to the community, such as a distributor or dealer of tobacco products.]

[(Direct) (circumstantial) evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.]

[The existence and scope of legitimate uses for the object in the community.]

[Expert testimony concerning the object's use.]

[Any evidence that alleged paraphernalia can be or has been used to store a controlled substance or to introduce a controlled substance into the human body as opposed to any legitimate use for the alleged paraphernalia.]

[Advertising of the item in magazines or other means which specifically glorify, encourage or espouse the illegal use, manufacture, sale or cultivation of controlled substance.]

Notes on Use

For authority, see K.S.A. 21-5711. This instruction should include only those factors in K.S.A. 21-5711 that are supported by evidence.

K.S.A. 21-5711(b) provides that "the fact that an item has not been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was possessed with the intention for use as drug paraphernalia." The trial court should be aware of this provision and may need to separately instruct the jury on what appears to be a statutory non-defense.

"Drug paraphernalia" does not include products, chemicals, or materials described in K.S.A. 21-5709(a).

57.180

DRUG PARAPHERNALIA DEFINED

"Drug paraphernalia" means all equipment and materials of any kind that are used or primarily intended or designed for use in (planting) (propagating) (cultivating) (growing) (harvesting) (manufacturing) (compounding) (converting) (producing) (processing) (preparing) (testing) (analyzing) (packaging) (repackaging) (storing) (containing) (concealing) (injecting) (ingesting) (inhaling) (or otherwise introducing into the human body) a controlled substance.

"Drug paraphernalia" includes:

- (1) [insert specific item of paraphernalia],**
- (2) [insert specific item of paraphernalia], or**
- (3) [insert specific item of paraphernalia].**

Notes on Use

For authority, see K.S.A. 21-5701(f). The specific items of paraphernalia listed in the statute and that are applicable to the case should be inserted into the instruction. This instruction should include only those items supported by the evidence. Inapplicable words should be stricken. See PIK 4th 57.100 regarding misdemeanor and felony drug paraphernalia possession.

"Drug paraphernalia" does not include products, chemicals, or materials described in K.S.A. 21-5709(a).

Comment

The trial court's instruction, which closely tracked both K.S.A. 2014 Supp. 21-5701(f)(5) and PIK Crim. 4th 57.180, was not clearly erroneous. The trial court also gave instructions that mirror PIK Crim. 4th 57.100 and PIK Crim. 4th 57.170. Therefore, read as a whole, the court's instructions did not invade the province of the jury by instructing them to find the defendant guilty for merely possessing an item listed in the trial court's version of PIK Crim. 4th 57.180. *State v. Sisson*, 302 Kan.123, 351 P.3d 1235 (2015); *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).

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Trial courts must carefully tailor the above definition of "drug paraphernalia" by differentiating between those terms that apply to felony possession of "drug paraphernalia" and those terms that apply to misdemeanor possession of "drug paraphernalia." *State v. Unruh*, 281 Kan. 520, 532, 133 P.3d 35 (2006).

57.190

SIMULATED CONTROLLED SUBSTANCES

The defendant is charged with unlawfully (distributing) (possessing with the intent to distribute) (manufacturing with the intent to distribute) (using) (possessing with the intent to use) a simulated controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (distributed) (possessed with the intent to distribute) (manufactured with the intent to distribute) (used) (possessed with the intent to use) a simulated controlled substance.
- [2. The defendant did so on or within 1,000 feet of school property, and was 18 or more years old.]
2. or 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Simulated controlled substance" means any product that identifies itself by a common name or slang term associated with a controlled substance and that indicates on its label or accompanying promotional material that the product simulates the effect of a controlled substance.

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

"Manufacture" does not include:

- (1) The preparation or compounding of a controlled substance by an individual for the individual's own lawful use.
- (2) The preparation, compounding, packaging, or labeling of a controlled substance:

- (a) by a practitioner of a professional practice, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
 - (b) by a practitioner of a professional practice, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.]
- (3) The addition of dilutants or adulterants, including quinine, hydrochloride, mannitol, mannite, dextrose, or lactose, that are intended for use in cutting a controlled substance.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

["School property" means property on which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 through 12. It is not required that school be in session or that classes are actually being held at the time of the alleged offense or that children must be present within the structure or on the property during the time of any alleged offense.]

Notes on Use

For authority, see K.S.A. 21-5713(a) and (b). Violation of K.S.A. 21-5713(a) is a nondrug severity level 9, nonperson felony, except that it is a nondrug severity level 7, nonperson felony if the person is 18 or more years old and the violation occurs on or within 1,000 feet of any school property. Violation of subsection (b) is a class A nonperson misdemeanor. The definition of "simulated controlled substance" can be found in K.S.A. 21-5701(s).

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

57.200

**REPRESENTATION THAT A NONCONTROLLED SUBSTANCE
IS A CONTROLLED SUBSTANCE**

The defendant is charged with (distributing) (possessing with the intent to distribute) a noncontrolled substance under circumstances that it would appear to be insert name of controlled substance . The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (distributed a substance which was not insert name of controlled substance) (possessed a substance which was not insert name of controlled substance with the intent to distribute it).

OR

1. The defendant (distributed a substance which was not insert name of controlled substance) (possessed a substance which was not insert name of controlled substance with the intent to distribute it) to insert name of minor person to whom substance was distributed or intended to be distributed .

2. The defendant made an express representation that the substance distributed was insert name of controlled substance .

OR

2. The defendant made an express representation that the substance distributed was of such nature or appearance that the recipient would be able to distribute it as insert name of controlled substance .

OR

2. The distribution of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was insert name of controlled substance .

- [3. The defendant was, at the time, 18 or more years old.

4. *Insert name of the recipient or intended recipient of the substance* was, at the time, less than 18 years old.
5. The defendant was at least three years older than *insert name of the recipient or intended recipient of the substance* .]

3. or 6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-5714. Violation of K.S.A. 21-5714 is a class A, nonperson misdemeanor, except that any person 18 or more years old who distributes or possesses with the intent to distribute a substance to a person less than 18 years old and who is at least three years older than the minor to whom the distribution is made is guilty of a nondrug severity level 9, nonperson felony. In case the felony level of the crime is alleged, the second alternative for Element No. 1, together with bracketed Element Nos. 3 – 5 should be used.

The definitions used here can be found in K.S.A. 21-5701.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

A person who commits a violation of K.S.A. 21-5714 may also be prosecuted for theft.

Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113. See K.S.A. 21-5701(a). The appropriate controlled substance should be inserted in the instruction.

If applicable, an instruction should be given covering the presumption arising by virtue of K.S.A. 21-5714(c). See PIK 4th 57.210.

57.210

**REPRESENTATION THAT NONCONTROLLED SUBSTANCE IS
CONTROLLED SUBSTANCE—INFERENCE**

If you find that any of the following factors is established by the evidence, then you may presume that distribution of the substance was under circumstances which would give a reasonable person reason to believe that the substance is a controlled substance:

- (1) The substance was packaged in a manner normally used for the illegal distribution of controlled substances.
- (2) The distribution of the substance included an exchange of or demand for money or other consideration for distribution of the substance, and the amount of the consideration was substantially in excess of the reasonable value of the substance.
- (3) The physical appearance of the capsule or other material containing the substance was substantially identical to a specific controlled substance.

You may consider this inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the distribution of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was a controlled substance. This burden never shifts to the defendant.

"Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.

Notes on Use

For authority, see K.S.A. 21-5714(c).

57.220

RECEIVING OR ACQUIRING PROCEEDS DERIVED FROM DRUG CRIMES

The defendant is charged with (receiving) (acquiring) (engaging in a transaction involving) proceeds known to be derived from the crime of insert crime. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (received) (acquired) (engaged in a transaction involving) proceeds known to be derived from the crime of insert crime.

OR

1. The defendant (distributed) (invested) (concealed) (transported) (maintained an interest in) (made available) _____, a thing of value which defendant knew was intended to be used for the purpose of furthering the commission of the crime of insert crime.

OR

1. The defendant (directed) (planned) (organized) (initiated) (financed) (managed) (supervised) (facilitated) the (transportation) (transfer) of proceeds known to be derived from the crime of insert crime.

OR

1. The defendant conducted a financial transaction involving the proceeds derived from the crime of insert crime, which transaction was designed, in whole or in part, (to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds known to be derived from _____) (to avoid a transaction reporting requirement under [state] [federal] law).
2. The value of the proceeds was (less than \$5,000) (at least \$5,000 but less than \$100,000) (at least \$100,000 but less than \$250,000) (at least \$250,000 but less than \$500,000) (\$500,000 or more).

3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

["Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.]

[The elements of insert the appropriate felony violation are (set forth in Instruction No. _____) (as follows: _____).]

Notes on Use

For authority, see K.S.A. 21-5716. The severity level for a violation of K.S.A. 21-5716 varies depending on the value of the proceeds involved. The crime is a drug severity level 5 felony if the value of the proceeds is less than \$5,000, a drug severity level 4 felony if the value of the proceeds is at least \$5,000 but less than \$100,000, a drug severity level 3 felony if the value of the proceeds is at least \$100,000 but less than \$250,000, a drug severity level 2 felony if the value of the proceeds is at least \$250,000 but less than \$500,000, and a drug severity level 1 felony if the value of the proceeds is \$500,000 or more.

References in the elements above to the "crime of _____" refers to violations of K.S.A. 21-5701 through 21-5717, except that a violation of the first alternative in Element No. 1 may be based either on a violation of K.S.A. 21-5701 through 21-5717 or a substantially similar law from another jurisdiction.

57.230

POSSESSION BY DEALER—NO TAX STAMP AFFIXED

The defendant is charged with possession of insert name of controlled substance (marijuana), without Kansas tax stamps affixed. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant possessed more than _____ (grams) (dosage units) of insert name of controlled substance (marijuana) without affixing official Kansas tax stamps or other labels showing that the tax has been paid.
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

Notes on Use

For authority, see K.S.A. 79-5201 *et seq.* Pursuant to K.S.A. 79-5208, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, label or other indicia is guilty of a severity level 10 felony.

Under K.S.A. 79-5204(c) and (d), the drug tax is due and payable, and drug tax stamps must be affixed immediately upon receipt, acquisition or possession of the controlled substance. *State v. Schoonover*, 281 Kan. 453, 511, 133 P.3d 48 (2006).

Comment

Before July 1, 2011 Revisions to Criminal Code

In order to sustain a conviction for possession of a controlled substance that is sold by weight without a tax stamp, the accused must have more than 1 gram of the controlled substance in his or her possession. *State v. Lockhart*, 24 Kan. App. 2d 488, 947 P.2d 461 (1997).

In *State v. Hutcherson*, 25 Kan. App. 2d 501, 968 P.2d 1109 (1998), a defendant found to be in possession of nine rocks of crack cocaine was not considered a dealer, the court holding

that evidence showed crack cocaine is sold by dosage although powder cocaine may be sold by weight. However, a defendant in possession of three rocks of crack cocaine was found to be a dealer where one rock weighed more than seven grams and the charge referred to weight rather than dosage. *State v. Edwards*, 27 Kan. App. 2d 754, 9 P.3d 568 (2000).

Where defendant had possession of two packages, neither of which was weighed separately but when weighed together weighed 1.4 grams, and neither package was tested separately but were mixed together before testing, the defendant's conviction for no tax stamp was reversed. *State v. Beal*, 26 Kan. App. 2d 837, 994 P.2d 669 (2000).

The Kansas drug tax does not impose a criminal penalty for double jeopardy purposes. *State v. Jensen*, 259 Kan. 781, 915 P.2d 109 (1996); *State v. Yeoman*, 24 Kan. App. 2d 639, 951 P.2d 964 (1997).

"A conviction under K.S.A. 79-5201 *et seq.* is not dependent on a conviction of any other crimes and does not depend on proving 'intent to sell' or whether, in fact, a defendant is a 'dealer' as that term is commonly understood." *State v. Engles*, 270 Kan. 530, 17 P.3d 355 (2001).

57.240**TRAFFICKING IN COUNTERFEIT DRUGS**

The defendant is charged with trafficking in counterfeit drugs. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally (manufactured) (distributed) (dispensed) (sold or delivered for consumption purposes) (held or offered for sale) any counterfeit drug, knowing it to be counterfeit.**
- 2. The retail value of the counterfeit drug (manufactured) (distributed) (dispensed) (sold or delivered for consumption purposes) (held or offered for sale) was (less than \$500) (at least \$500 but less than \$25,000) (\$25,000 or more).**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-4167. Trafficking in counterfeit drugs with a retail value of less than \$500 is a class A nonperson misdemeanor. Trafficking in counterfeit drugs with a retail value of at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Trafficking in counterfeit drugs with a retail value of \$25,000 or more is a severity level 7, nonperson felony.

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57.250

INDUSTRIAL HEMP—UNLAWFUL ACTIVITIES

The defendant is charged with unlawfully (manufacturing) (marketing) (selling) (distributing) a hemp product. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (manufactured) (marketed) (sold) (distributed) insert name of hemp product.**
- 2. The insert name of hemp product contained industrial hemp.**

OR

- 2. The insert name of hemp product was [designed by the manufacturer for (human) (animal) consumption] [(marketed) (sold) for (human) (animal) consumption] [distributed with the intent that it be used for (human) (animal) consumption] and contained insert name of prohibited ingredient derived from industrial hemp.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

["Human or animal consumption" means ingested orally or applied by any means such that an ingredient derived from industrial hemp enters the human or animal body.]

Notes on Use

For authority, see K.S.A. 2-3908, a violation of which is a class A misdemeanor for the first conviction and a level 9, nonperson felony for the second and subsequent convictions.

57.260

INDUSTRIAL HEMP – UNAUTHORIZED RECIPIENTS

The defendant is charged with unlawfully (marketing) (selling) (distributing) a hemp product to an unauthorized recipient. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (marketed) (sold) (distributed) insert name of hemp product to insert name of recipient.
2. Insert name of recipient was not registered with the Kansas department of agriculture as a hemp processor.
3. Insert name of recipient did not possess a state license under an approved commercial industrial hemp plan.
4. Insert name of recipient was not an industrial hemp research program established by the Kansas department of agriculture.
5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 2-3908(b), a violation of which is a class A misdemeanor for the first conviction and a level 9, nonperson felony for the second and subsequent convictions.

58.010

THEFT

The defendant is charged with theft. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was the owner of the property.
2. The defendant (obtained) (exerted) unauthorized control over the property.

OR

2. The defendant obtained control over the property by deception of insert name who had relied in whole or in part upon the deception.

OR

2. The defendant obtained by threat control over property.

OR

2. The defendant obtained control over property knowing the property to have been stolen by another.
3. The defendant intended to deprive insert name permanently of the use or benefit of the property.
4. The value of the property was (\$100,000 or more) (at least \$25,000 but less than \$100,000) (less than \$25,000 and the property was a firearm) (at least \$1,500 but less than \$25,000) (less than \$1,500) (at least \$50 but less than \$1,500).
5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[As used in this instruction "deception" means knowingly creating or reinforcing a false impression, including a false impression as to law, value, intention or other state of mind. Deception as to a person's intention to perform a promise shall not be inferred only from the fact that the person did not subsequently perform the promise.

"Deception" does not include falsity as to a matter having no financial significance, or puffing — an exaggerated claim that is so obvious it is unlikely to deceive a reasonable person.]

Notes on Use

For authority, see K.S.A. 21-5801. Theft of property of the value of \$100,000 or more is a severity level 5, nonperson felony. Theft of property of the value of \$25,000 but less than \$100,000 is a severity level 7, nonperson felony. Theft of property of the value of at least \$1,500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of property which is a firearm valued at less than \$25,000 is a severity level 9, nonperson felony. Theft of property of the value of less than \$1,500 is a class A, nonperson misdemeanor, unless the property is a firearm or the value of the property is at least \$50 but less than \$1,500 and the theft is committed by a person who has been convicted of theft two or more times within five years immediately preceding commission of the crime, excluding any period of imprisonment. In those cases, the theft is a severity level 9, nonperson felony.

In a felony theft prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft if value is in issue. PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

For a definition of "deprive permanently," see K.S.A. 21-5111(f).

In cases where the State resorts to the statutory presumption of K.S.A. 21-3702 (prior version of K.S.A. 21-5804) to establish intent to permanently deprive, an instruction on the meaning of *prima facie* is required. See PIK 4th 58.090, Statutory Inference of Intent to Deprive, and *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977).

In situations where there is a question in the mind of the prosecutor as to the type of theft to charge under K.S.A. 21-3701 (prior version of K.S.A. 21-5801), it is permissible to charge in the alternative. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980).

Comment

In order for a defendant to be found guilty of theft by deception, the State must present evidence that the person relinquishing control of the property was actually deceived by and actually relied upon the false representation. *State v. Ward*, 307 Kan. 245, 408 P.3d 954 (2018).

Before July 1, 2011 Revisions to Criminal Code

In *State v. McKissack*, 283 Kan. 721, 156 P.3d 1249 (2007), the Supreme Court held that under the strict elements test of K.S.A. 21-3107(2) [now K.S.A. 21-5109(b)], criminal deprivation of property is a separate offense and not a lesser included offense of theft.

In a prosecution for felony theft where value is in issue, an instruction with respect to the element of value and a finding as to value is required. *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975); *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976); *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977).

The Committee believes that no instruction should be given relating to the circumstances of possession of goods proven to have been recently stolen. The statute defining the crime of theft as compared with what was formerly larceny does not require the elements of taking and carrying away. These were elements which the traditional instruction permitted to be inferred against the possessor by the fact of possession.

There is doubt that the principle was ever proper as an instruction. The circumstance of possession of goods recently stolen is a rule of evidence, not a rule of law. Its only application should have been in determining whether as a matter of law there was sufficient evidence to justify submitting the case to the jury. Comment noted and approved in *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

To convict a defendant of theft under K.S.A. 21-3701(a)(4), the State has the burden of proving that the defendant, at the time he received property, had a belief or reasonable suspicion from all the circumstances known to him that the property was stolen, and that the act was done with intent to deprive the owner permanently of the possession, use, or benefit of his property. Although PIK 59.01 was approved, additional instruction was required to fully inform the jury of the elements of the offense. *State v. Bandt*, 219 Kan. 816, 549 P.2d 936 (1976). PIK 3d 59.01-A should be used with PIK 3d 59.01 in possession of stolen property cases.

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires the State to prove in a theft-by-deception prosecution, pursuant to K.S.A. 21-3701(a)(2), that the victim was deceived by reliance in whole or in part upon the false statement. See also *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980), *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990), and *State v. Laborde*, 303 Kan. 1, 36 P.3d 1080 (2015).

In *State v. Keeler*, 238 Kan. 356 Syl. ¶ 8, 710 P.2d 1279 (1985), the Court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 1984 Supp. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved." See also, *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

In *State v. Ringi*, 238 Kan. 523 Syl. ¶ 2, 712 P.2d 1223 (1986), the Court held: "The charge of theft by deception under K.S.A. 1984 Supp. 21-3701(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3707." In that case, a defendant could be charged with both offenses when they occurred on different days.

In *State v. Hanks*, 10 Kan. App. 2d 666, 708 P.2d 991 (1985), the Court rejected the defendant's arguments that: (1) proof of two prior theft convictions is an element of a class E felony theft which should have been included in the jury instructions, and (2) that "theft" is a lesser included offense of "theft after having been convicted of theft two or more times within the preceding five years."

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the Court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

The asportation (carrying away) element of common-law larceny is included within the term "obtain or exert control" by statutory definition contained in K.S.A. 21-3110(12) and does not need to be separately set forth in a theft charge under K.S.A. 21-3701(a)(1) alleging a defendant obtained or exerted unauthorized control over the property. *State v. Freitag*, 247 Kan. 499, 802 P.2d 502 (1990).

Neither theft nor conspiracy to commit theft were intended by the Legislature to be a continuing offense. *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991).

Sales tax is not part of the "value" of unsold retail merchandise stolen from a store. *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814, *rev. denied* 241 Kan. 839 (1987).

An information charging the defendant with felonious theft of 8,434 gallons of regular gasoline in violation of K.S.A. 21-3701, a class E felony, and which did not allege that the defendant had been convicted of theft two or more times in the last five years, when read in its entirety, construed according to common sense, and interpreted to include facts necessarily implied, sufficiently informed the defendant that the value of the gasoline taken was \$150 or more even though not specifically alleged. *State v. Crichton*, 13 Kan. App. 2d 213, 766 P.2d 832, *rev. denied* 244 Kan. 739 (1988).

In *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991), the Court held that, under the facts of the case, convictions for forgery and theft by deception were multiplicitous, applying the second prong of the two-prong test as stated in *State v. Fike*, 243 Kan. 365, 368, 757 P.2d 724 (1988). The Court also held that, under the facts of the case, the delivery of a forged check was an included offense of theft by deception.

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

In *State v. Watson*, 39 Kan. App. 2d 923, 186 P.3d 812 *rev. denied* 287 Kan. 769 (2008), the court held that "taking" property from the owner is not an element of theft under K.S.A. 21-3701(a)(1). All that is required is unauthorized control, coupled with intent to permanently deprive the owner of the use or benefit of the property.

58.011

THEFT OF REGULATED SCRAP METAL

The defendant is charged with theft of regulated scrap metal. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

1. Insert name was the owner of the regulated scrap metal.
2. The defendant (obtained) (exerted) unauthorized control over the regulated scrap metal.

OR

2. The defendant obtained control over the regulated scrap metal by deception of insert name who had relied in whole or in part upon the deception.

OR

2. The defendant obtained by threat control over regulated scrap metal.

OR

2. The defendant obtained control over regulated scrap metal knowing it was stolen by another.

3. The defendant intended to deprive the owner permanently of the use or benefit of the regulated scrap metal.

4. The value of the regulated scrap metal was (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least \$1,500 but less than \$25,000) (less than \$1,500) (at least \$50 but less than \$1,500).

5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Regulated scrap metal" means insert applicable portion of definition found at K.S.A. 50-6,109.

"Value" means the value of the regulated scrap metal or the cost to restore the site of the theft of the regulated scrap metal to its condition at the time immediately prior to the theft of the regulated scrap metal, whichever is greater.

[As used in this instruction "deception" means knowingly creating or reinforcing a false impression, including a false impression as to law, value, intention or other state of mind. Deception as to a person's intention to perform a promise shall not be inferred only from the fact that the person did not subsequently perform the promise.]

"Deception" does not include falsity as to a matter having no financial significance, or puffing — an exaggerated claim that is so obvious it is unlikely to deceive a reasonable person.]

[You may infer that a person intended to permanently deprive the owner of regulated scrap metal of the possession, use, or benefit of the property when that person insert one of the following:

- **either in whole or in part (fails to give information) (gives false information) regarding insert description of information required to be accurately provided under K.S.A. 50-6,110(a).**
- or**
- **transports regulated scrap metal (outside the county where it was obtained) (across state lines).**
- or**
- **alters any regulated scrap metal prior to any transaction with a scrap metal dealer.**

You may consider this inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.]

Notes on Use

For authority, see K.S.A. 21-5801 and 21-5804(d). Theft of regulated scrap metal of the value of \$100,000 or more is a severity level 5, nonperson felony. Theft of regulated scrap metal of the value of \$25,000 but less than \$100,000 is a severity level 7, nonperson felony. Theft of regulated scrap metal of the value of at least \$1,500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of regulated scrap metal of the value of less than \$1,500 is a class

A, nonperson misdemeanor unless the value is at least \$50 but less than \$1,500 and the theft is committed by a person who has been convicted of theft two or more times within five years immediately preceding commission of the crime, excluding any period of imprisonment. In that case, the theft is a severity level 9, nonperson felony. See also the Notes on Use and Comments to PIK 4th 58.010, Theft and Comments to PIK 4th 58.090, Statutory Inference of Intent to Deprive.

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58.020

THEFT—KNOWLEDGE PROPERTY STOLEN

Knowledge that property has been stolen by another must exist at the time control first occurs and may be proven by a showing that the defendant either knew or had a reasonable suspicion from all the circumstances known to the defendant that the property was stolen.

Notes on Use

The instruction should be used with PIK 4th 58.010, Theft, in a prosecution for violation of K.S.A. 21-5801(a)(4), receiving stolen property.

State v. Bandt, 219 Kan. 816, 549 P.2d 936 (1976), required that knowledge of the stolen character of the property must have existed at the time control of the property first occurred.

Comment

Before July 1, 2011 Revisions to Criminal Code

Stolen property, once recovered either by the owner or law enforcement officers, is no longer stolen property as contemplated in K.S.A. 21-3701(a)(4). Therefore, one cannot be convicted of theft by obtaining control over stolen property when actual physical possession of the stolen property has been recovered by the owner or by law enforcement officers as agents for the owner, before delivery of the property to the accused. *State v. Sterling*, 230 Kan. 790, 640 P.2d 1264 (1982).

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58.030

**THEFT—MULTIPLE ACTS—
THREE MERCHANTS WITHIN 72 HOURS**

The defendant is charged with theft of property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. List all merchants were the owners of the property.
2. List all merchants were separate mercantile establishments.
3. The defendant (obtained) (exerted) unauthorized control over the property from each of the merchants.

OR

3. The defendant obtained control over the property from each of the merchants by deception of list all merchants who had relied in whole or in part upon the deception.

OR

3. The defendant obtained control over property from each of the merchants by threat.

OR

3. The defendant obtained control over property knowing the property to have been stolen by another from each of the merchants.
4. The defendant intended to deprive list all merchants permanently of the use or benefit of the property.
5. All of the above acts occurred within a 72-hour period.
6. The value of the property taken from each merchant was less than \$1,500.
7. These acts occurred on or between the _____ days of _____, _____, in _____ County, Kansas.

[As used in this instruction "deception" means knowingly creating or reinforcing a false impression, including a false impression as to law, value, intention or other state of mind. Deception as to a person's intention to perform a promise shall not be inferred only from the fact that the person did not subsequently perform the promise.]

"Deception" does not include falsity as to a matter having no financial significance, or puffing — an exaggerated claim that is so obvious it is unlikely to deceive a reasonable person.]

Notes on Use

For authority, see K.S.A. 21-5801(b)(5). This is a severity level 9, nonperson felony, even if the property is a firearm.

In *State v. Barnes*, 31 Kan. App. 2d 825, 74 P.3d 591 (2003), the Court of Appeals construed K.S.A. 21-3701(b)(3) to provide two forms of felony theft regardless of the value of the items stolen. One is by theft in three mercantile establishments within a 72 hour period, and the second is theft in two or more acts or transactions connected together or constituting part of a common scheme or design. PIK 4th 58.030 should not be used if the complaint charges the second type of theft.

Comment

In order for a defendant to be found guilty of theft by deception, the State must present evidence that the person relinquishing control of the property was actually deceived by and actually relied upon the false representation. *State v. Ward*, 307 Kan. 245, 408 P.3d 954 (2018).

58.040

THEFT—MULTIPLE ACTS—COMMON SCHEME

The defendant is charged with theft of property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name(s) of owner(s) owned the property.
2. The defendant (obtained) (exerted) unauthorized control over the property.

OR

2. The defendant obtained control over the property by deception of insert name who had relied in whole or in part upon the deception.

OR

2. The defendant obtained control over property by threat.

OR

2. The defendant obtained control over property knowing the property to have been stolen by another.
3. The defendant intended to deprive insert name permanently of the use or benefit of the property.
4. The defendant committed two or more of the acts described above.
5. The acts were connected together or constituted part of a common scheme or course of conduct.
6. The value of the property taken in each act was less than \$1,500.
7. These acts occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[As used in this instruction "deception" means knowingly creating or reinforcing a false impression, including a false impression as to law, value, intention or other state of mind. Deception as to a person's intention to perform a promise shall not be inferred only from the fact that the person did not subsequently perform the promise.]

"Deception" does not include falsity as to a matter having no financial significance, or puffing — an exaggerated claim that is so obvious it is unlikely to deceive a reasonable person.]

Notes on Use

For authority, see K.S.A. 21-5801. This is a severity level 9, nonperson felony.

In *State v. Barnes*, 31 Kan. App. 2d 825, 74 P.3d 591 (2003), the Court of Appeals construed K.S.A. 21-3701(b)(3) to provide two forms of felony theft regardless of the value of the items stolen. One is by theft in three mercantile establishments within a 72 hour period, and the second is theft in two or more acts or transactions connected together or constituting part of a common scheme or design. PIK 4th 58.040 should be used if the complaint charges the second type of theft.

Multiple victims should be listed separately in elements 1, 2, and 3.

Comment

In order for a defendant to be found guilty of theft by deception, the State must present evidence that the person relinquishing control of the property was actually deceived by and actually relied upon the false representation. *State v. Ward*, 307 Kan. 245, 408 P.3d 954 (2018).

58.050

THEFT OF SERVICES

The defendant is charged with theft of services. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant obtained services in the form of insert service from insert name.
2. The defendant obtained these services by deception of insert name who had relied in whole or in part upon the deception.

OR

2. The defendant obtained these services by threat.
3. The defendant intended to permanently deprive insert name of the value of the services.
4. The value of the services obtained was (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least \$1,500 but less than \$25,000) (less than \$1,500) (at least \$50 but less than \$1,500).
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[As used in this instruction "deception" means knowingly creating or reinforcing a false impression, including a false impression as to law, value, intention or other state of mind. Deception as to a person's intention to perform a promise shall not be inferred only from the fact that the person did not subsequently perform the promise.

"Deception" does not include falsity as to a matter having no financial significance, or puffing — an exaggerated claim that is so obvious it is unlikely to deceive a reasonable person.]

Notes on Use

For authority, see K.S.A. 21-5801. Theft of services of the value of \$100,000 or more is a severity level 5, nonperson felony. Theft of services of the value of \$25,000 but less than \$100,000 is a severity level 7, nonperson felony. Theft of services of the value of at least \$1,500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of services of the value of less than \$1,500 is a class A, nonperson misdemeanor unless the value of the services is at least \$50 but less than \$1,500 and the theft was committed by a person who has been convicted of theft two or more times within five years immediately preceding commission of the crime, excluding any period of imprisonment. In that case, the theft is a severity level 9, nonperson felony.

In a felony theft of services prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft of services if value is in issue. PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

Comment

In order for a defendant to be found guilty of theft by deception, the State must present evidence that the person relinquishing control of the property was actually deceived by and actually relied upon the false representation. *State v. Ward*, 307 Kan. 245, 408 P.3d 954 (2018).

Before July 1, 2011 Revisions to Criminal Code

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires proof of reliance by the victim upon the false representation or statement of the defendant. See also *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980), *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990), and *State v. Laborde*, 303 Kan. 1, 36 P.3d 1080 (2015).

58.060

THEFT—WELFARE FRAUD

The defendant is charged with theft of social welfare assistance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (obtained) (attempted to obtain) (aided or abetted insert name of applicant or client in obtaining) assistance in the form of describe applicable assistance as defined in K.S.A. 39-702(d) to which (defendant) (name of applicant or client) was not entitled.
2. The defendant did so by (means of a willfully false statement or representation) (impersonation) (collusion) (fraudulent device).
3. The value of the assistance was (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least \$1,500 but less than \$25,000) (less than \$1,500) (at least \$50 but less than \$1,500).
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 39-720, 39-702(d) and 21-5801. Theft of assistance of the value of \$100,000 or more is a severity level 5, nonperson felony. Theft of assistance of the value of \$25,000 but less than \$100,000 is a severity level 7, nonperson felony. Theft of assistance of the value of at least \$1,500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of assistance of the value of less than \$1,500 is a class A, nonperson misdemeanor, except that theft of assistance of the value of at least \$50 but less than \$1,500 is a severity level 9, nonperson felony if committed by a person who has been convicted of theft two or more times within the last five years immediately preceding the commission of the crime, excluding any period of imprisonment.

In a felony theft prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft if value is in issue. PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the Court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

In a welfare fraud case, prosecution should be pursuant to the specific welfare fraud statute, K.S.A. 39-720, rather than the general statute for the crime of making a false writing, K.S.A. 21-3711. *State v. Wilcox*, 245 Kan. 76, 775 P.2d 177 (1989). The implications of *Wilcox* were considered in *State v. Jones*, 246 Kan. 180, 787 P.2d 738 (1990), and the court held that K.S.A. 39-720 had no application to a situation involving theft (K.S.A. 21-3701) from a program or agency not administered by the Department of Social and Rehabilitation Services.

58.070

THEFT OF LOST OR MISLAID PROPERTY

The defendant is charged with theft of (lost property) (mislaidd property) (property delivered by mistake). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. Insert name was the lawful owner of the property.**
- 2. The property was (lost) (mislaidd) (delivered by mistake).**
- 3. The defendant obtained control of the property.**
- 4. The defendant knew or learned that insert name was the lawful owner of the property.**
- 5. The defendant failed to take reasonable measures to restore the property to insert name.**
- 6. The defendant intended to deprive insert name permanently of the (possession) (use) (benefit) of the property.**
- 7. The value of the property was (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least \$1,000 but less than \$25,000) (less than \$1,000).**
- 8. This failure to act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction "property delivered by mistake" includes, but is not limited to a mistake as to the:

- (1) nature or amount of the property; or**
- (2) identity of the recipient of the property.**

Notes on Use

For authority, see K.S.A. 21-5802. Theft of lost or mislaidd property of the value of \$100,000 or more is a severity level 5, nonperson felony. Theft of lost or mislaidd property of the value of at least \$25,000 but less than \$100,000 is a severity level 7, nonperson felony. Theft of lost or mislaidd property of the value of at least \$1,000 but less than \$25,000 is a severity level 9, nonperson felony. Theft of lost or mislaidd property of a value of less than \$1,000 is a class A, nonperson misdemeanor.

For a definition of "deprive permanently," see Appendix 1—Definitions and Explanations of Terms.

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime. (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

58.080

CRIMINAL DEPRIVATION OF PROPERTY

The defendant is charged with criminal deprivation of property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. Insert name was the owner of the property in question.**
- 2. The defendant (obtained) (exerted) unauthorized control over the property without the owner's consent.**
- 3. The defendant intended to temporarily deprive the owner of the use or benefit of such owner's property.**
- [4. The property was a (firearm) (motor vehicle).]**
- 4. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5803. Criminal deprivation of property other than a motor vehicle, as defined in K.S.A. 8-1437, is a class A, nonperson misdemeanor. Upon a second or subsequent conviction, the sentence shall be not less than 30 days imprisonment and not less than a \$100 fine, except where such sentence and fine would result in a manifest injustice.

Criminal deprivation of property that is a firearm, as defined in K.S.A. 21-5111(m), is a severity level 9, nonperson felony. Criminal deprivation of property that is a motor vehicle, as defined in K.S.A. 8-1437, is a class A, nonperson misdemeanor. Upon a first conviction of this subsection, a person shall be sentenced to not less than 30 days nor more than one year's imprisonment and fined not less than \$100. Upon a second or subsequent conviction of this subsection, a person shall be sentenced to not less than 60 days nor more than one year's imprisonment and fined not less than \$200. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the minimum mandatory sentence as provided herein. The mandatory provisions of this subsection shall not apply to any person where such application would result in a manifest injustice.

The bracketed element should be given if the property is a firearm or motor vehicle because of the enhanced sentence. K.S.A. 21-5803(b)(1)(A).

For definition of "temporarily deprive," see Appendix 1—Definitions and Explanations of Terms.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. McKissack*, 283 Kan. 721, 156 P.3d 1249 (2007), the Supreme Court held that under the strict elements test of K.S.A. 21-3107(2) [now K.S.A. 21-5109(b)], criminal deprivation of property is a separate offense and not a lesser included offense of theft. The common law test applied prior to the 1998 amendment to the statute led to a different result, as in *State v. Keeler*, 238 Kan. 356, Syl. ¶ 8, 710 P.2d 1279 (1985), in which the Court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved." See also *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), which holds that an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

58.090

STATUTORY INFERENCE OF INTENT TO DEPRIVE

You may infer that a person intended to permanently deprive the (owner) (lessor) of the possession, use, or benefit of the property when that person insert one of the following:

- gave false identification or a fictitious name, address or place of employment at the time of buying, selling, leasing, trading, gathering, collecting, soliciting, procuring, receiving, dealing, or otherwise obtaining or exerting control over the property.
or
- (leased) (rented) personal property if the person:
 - (i) failed to return the personal property within 10 days after the date required by the (lease) (rental agreement); and
 - (ii) received written notice to return the property within seven days after receipt of the notice and did not do so.or
- destroyed, broke or opened a lock, chain, key switch, enclosure, or other device used to secure the property in order to contain control over the property.
or
- destroyed or substantially damaged or altered the property so as to make the property unusable or unrecognizable in order to obtain control over the property.
or
- failed to return the book(s) or other material borrowed from a library within 30 days after receiving a written notice from the library requesting its return.
or
- (leased) (rented) a motor vehicle from a commercial (lessor) (renter) if the person:
 - (i) had a written rental agreement that provided for the return of the motor vehicle to a particular place at a particular time; and

- (ii) failed to return the motor vehicle within three days after (receipt of) (refusal to accept) written notice to return it.

or

- failed to return a vehicle to its owner if, at the time the person received possession of the vehicle, the owner delivered to the person a written instruction stating:
 - (i) the time and place to return the vehicle; and
 - (ii) that failure to comply may be prosecuted as theft.

or

- (without authority, removed from merchandise a theft detection device) (disabled a theft detection device on merchandise) prior to purchase.

or

- (failed to replace or reattach the nozzle and hose of the pump used to dispense motor fuels) (placed the nozzle and hose on the ground or pavement).

You may consider this inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

[You may infer that notice was received three days after the notice is deposited as registered or certified mail in the U.S. mail, addressed to the person who has (leased or rented the property) (borrowed the book[s] or other material from a library) as the address appears in the information supplied by the person at the time of the (leasing or renting) (borrowing) or at (his) (her) last known address.]

Notes on Use

For authority, see K.S.A. 21-5804(a)(1) on false identification; (a)(2) on failure to return leased or rented property; (a)(3) on destroying locks and other securing devices; (a)(4) on destroying the property taken; (a)(5) and (6) on motor vehicles; (a)(7) on theft detection devices; (a)(8) on gasoline hoses; and (b) on failure to return book(s) or other material from a library. "Notice" is defined in 21-5804(e). See PIK 4th Chapter 58, Crimes Involving Property, for the use of this instruction. The bulleted option relating to failure to return library materials is to be used only for prosecution of a misdemeanor under K.S.A. 21-5801 when the object of the alleged theft is a book or other material borrowed from a library. The bracketed paragraph may be given when there is no proof of actual receipt of notice or when receipt of notice is contested, if notice

was sent by registered or certified mail. This instruction should not be given when circumstances establish lack of receipt, such as when the postal return receipt states that the addressee was not found or is unknown.

Comment

Before July 1, 2011 Revisions to Criminal Code

State v. Smith, 223 Kan. 192, 573 P.2d 985 (1977), upheld the constitutionality of a statutory presumption where it is rebuttable and governs only the burden of going forward with the evidence, not the ultimate burden of proof. The Court stated: ". . . the use of a presumption to establish prima facie evidence does not destroy a defendant's presumption of innocence, nor does it invade the province of the jury as fact finders." It does require the defendant to go forward with evidence to rebut the presumption. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976). See Comment to PIK 3d 54.01, Inference of Intent, on the matter of shifting the burden on the defendant to produce evidence.

State v. Johnson, 233 Kan. 981, 986, 666 P.2d 706 (1983), again affirms that this instruction protects the defendant's rights when there exists a statutory presumption of intent to deprive. See also *Ulster County Court v. Allen*, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), which specifies when instructions on statutory presumptions are permissible.

58.100

**MANUFACTURE OR DISTRIBUTION OF A THEFT
DETECTION SHIELDING DEVICE**

The defendant is charged with the (manufacture) (distribution) of a theft detection shielding device. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (manufactured) (distributed) a (laminated bag) (coated bag) (insert other device).
2. Insert description of device was intentionally marketed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.
3. This act occurred on or about the ____ day of _____, ____ in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5805(a). Violation of this provision is a severity level 9, nonperson felony.

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58.110**POSSESSION OF A THEFT DETECTION SHIELDING DEVICE**

The defendant is charged with possession of a theft detection shielding device. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant possessed a (laminated bag) (coated bag) (insert other device) designed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.**
- 2. The defendant intended to commit a theft.**
- 3. This act occurred on or about the ____ day of _____, ____ in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5805(b). Violation of this provision is a severity level 9, nonperson felony.

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58.120

BURGLARY

The defendant is charged with burglary. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (entered) (remained in) a dwelling.

OR

1. The defendant (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (insert description of other structure) that was not a dwelling.

OR

1. The defendant (entered) (remained in) a (vehicle) (aircraft) (watercraft) (railroad car) (insert description of other means of conveyance of persons or property).
2. The defendant did so without authority.
3. The defendant did so with the intent to commit (a theft) (a theft of a firearm) (insert felony) (insert sexually motivated crime) therein.
- [4. The intended crime of insert crime was sexually motivated.]
4. or 5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____).

["Sexually motivated" means that one purpose for which the defendant committed the crime was for the defendant's sexual gratification.]

Notes on Use

For authority, see K.S.A. 21-5807(a), (c), and (d). Burglary as described in the first two alternatives of Element No. 1 is a severity level 7, person felony and burglary as described in the second alternative is a severity level 7, nonperson felony. Burglary as described in the third alternative Element No. 1 is a severity level 9, nonperson felony. Burglary of a dwelling with the intent to commit the theft of a firearm is a level 5, person felony, but burglary of a structure that is not a dwelling or burglary of a means of conveyance of persons or property is a level 5, nonperson felony.

For definition of "dwelling," see K.S.A. 21-5111(k).

The phrases "entering" and "remaining in" refer to distinct factual situations. This instruction should employ only the alternative phrase which is descriptive of the factual situation if the evidence is clear. If it is not, an instruction in the alternative is proper. See PIK 4th 58.130, Aggravated Burglary, Notes on Use.

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

A hog pen was held not to be a "structure" within the purview of the burglary statute, K.S.A. 21-3715. *State v. Fisher*, 232 Kan. 760, 658 P.2d 1021 (1983).

The opening of the bay door of a truck and reaching into the bay compartment to remove cases of beer constituted "entry" within the purview of K.S.A. 21-3715. *State v. Zimmerman and Schmidt*, 233 Kan. 151, 660 P.2d 960 (1983).

Where the consent to enter any of the structures or vehicles listed in K.S.A. 21-3715 and 21-3716 is obtained by fraud, deceit or pretense, the entry is not an authorized entry under the statute in that it is based on an erroneous or mistaken consent. Any such entry is unauthorized and when accompanied by the requisite intent is sufficient to support a burglary or aggravated burglary conviction. *State v. Maxwell*, 234 Kan. 393, 672 P.2d 590 (1983).

An information which charges burglary is defective in form unless it specifies the felony intended by an accused in making the unauthorized entry. However, if the felony intended in a burglary is made clear at the preliminary hearing or by the context of the other charge or charges in the information, the failure to allege the specific intended felony does not constitute reversible error. Such failure cannot result in surprise or be considered prejudicial to the defendant's substantial rights at trial when the intended felony was made clear in advance of trial. *State v. Maxwell*, *supra*.

In a prosecution for burglary, the manner of the entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation, if any, are all relevant in determining whether the intruder intended to commit a theft. The intent with which any entry is made is rarely susceptible of direct proof; it is usually inferred from the surrounding facts and circumstances. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984).

In a burglary prosecution, the elements of "intent to commit a felony or theft therein" and "without authority entering into or remaining within" are separate and distinct. The question of whether defendant had authority to enter the premises is to be resolved without reference to his intent at the time of entry. *State v. Harper*, 246 Kan. 14, 785 P.2d 1341 (1990).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also, *State v. Rush*, 255 Kan. 672, 859 P.2d 387 (1994).

Criminal trespass is not a lesser included offense of burglary. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 859 P.2d 387 (1994).

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58.130

AGGRAVATED BURGLARY

The defendant is charged with aggravated burglary. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (entered) (remained in) a dwelling.**

OR

- 1. The defendant (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (insert description of other structure) that was not a dwelling.**

OR

- 1. The defendant (entered) (remained in) a (vehicle) (aircraft) (watercraft) (railroad car) (insert description of other means of conveyance of persons or property).**
- 2. The defendant did so without authority.**
- 3. The defendant did so with the intent to commit (a theft) (insert felony) (insert sexually motivated crime) therein.**
- 4. At the time there was a human being in (insert description of structure or conveyance).**
- [5. The intended crime of insert crime was sexually motivated.]**
- 5. or 6. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____).

["Sexually motivated" means that one purpose for which the defendant committed the crime was for the defendant's sexual gratification.]

Notes on Use

For authority, see K.S.A. 21-5807(b) and (d). Aggravated burglary of a dwelling, even with the intent to commit the theft of a firearm, is a severity level 4, person felony. Aggravated burglary of a structure not used as a dwelling or aggravated burglary of a means of conveyance of persons or property is a severity level 5, person felony.

For definition of "dwelling," see K.S.A. 21-5111(k).

As of July 1, 2016, a person who enters or remains in a retail or commercial premises when it is open to the public no longer is guilty of aggravated burglary, despite having received a personal communication from the owner or manager of the premises not to enter or remain, unless the person enters or remains in the premises with the intent to commit a person felony or sexually motivated crime. K.S.A. 21-5807(e).

The phrases "entering" and "remaining in" refer to distinct factual situations. "Stated another way, these phrases constitute alternative means of committing the crime." *State v. Daws*, 303 Kan. 785, 788, 368 P.3d 1074 (2016). This instruction should employ only the phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. See *State v. Brown*, 6 Kan. App. 2d 556, 630 P.2d 731 (1981). See also *State v. Mogenson*, 10 Kan. App. 2d 470, 473, 701 P.2d 1339 (1985). To support a charge of the "entering" means of committing aggravated burglary, a human being must be present at the time of the unauthorized entry. *Daws*, 303 Kan. 785, Syl. ¶ 3. However, under the "remaining in" means of committing aggravated burglary, a burglary becomes an aggravated burglary if the human being enters before the defendant leaves. 303 Kan. at 791, citing *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973).

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

Comment

Evidence showing a defendant crossed the plane of a building's exterior wall satisfies the "entering" element. The "remaining in" element refers to the defendant's presence in the building's interior after entry has occurred. Both situations may take longer than a mere moment, but "remaining in" suggests at least briefly continuous behavior. *State v. Daws*, 303 Kan. 785, 368 P.3d 1074 (2016).

Under the elements of aggravated burglary, the "human being" must have been alive. *State v. Robinson*, 306 Kan. 431, 442, 394 P.3d 868 (2017).

Before July 1, 2011 Revisions to Criminal Code

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

In *State v. Walters*, 8 Kan. App. 2d 237, 655 P.2d 947 (1982), K.S.A. 21-3716 was held to be constitutional in that it did not violate due process or equal protection requirements by allowing for a conviction of aggravated burglary even if a burglar has no knowledge of the presence of another in the structure the burglar is entering.

The crime of aggravated burglary occurs whenever a human being is present in a building during the course of the burglary. The Kansas Court of Appeals had previously held that an information that charges the offense of aggravated burglary need not specify the point in time at which a victim was present, so long as it alleges that a human being was present sometime during

the course of the burglary. See *State v. Reed*, 8 Kan. App. 2d 615, 663 P.2d 680 (1983); *State v. Romero*, 31 Kan.App.2d 609, 69 P.3d 205 (2003). However, *Reed* and *Romero* were overruled by *State v. Daws*, 303 Kan. 785, 368 P.3d 1074 (2016).

When aggravated burglary is based upon the unlawful act of "remaining without authority" after a lawful entry, intent may be formed at the time of the lawful entry or after consent to an otherwise lawful entry has been withdrawn. *State v. Mogenson*, 10 Kan. App. 2d 470, 701 P.2d 1339 (1985); *State v. Gutierrez*, 285 Kan. 332, 172 P.3d 18 (2007).

In *State v. Holcomb*, 240 Kan. 715, 732 P.2d 1272 (1987), the Court held that it was not multiplicitous to charge the defendant with aggravated burglary and aggravated robbery arising from a single transaction because each offense requires proof of facts not required to prove the other. See *State v. Higgins*, 243 Kan. 48, 755 P.2d 12 (1988).

The aggravated burglary requirement under K.S.A. 21-3716 that a burglarized building be occupied should be broadly interpreted to include multi-unit structures in which there is a possibility of contact between the victim and the burglar. *State v. Dorsey*, 13 Kan. App. 2d 286, 769 P.2d 38, *rev. denied* 244 Kan. 739 (1989).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994) and *State v. Richmond*, 258 Kan. 449, 904 P.2d 981 (1995).

Criminal trespass is not a lesser included offense of burglary. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).

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58.140

CRIMINAL TRESPASS

The defendant is charged with criminal trespass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (entered) (remained upon) (remained in) insert description of property or premises.**
- 2. The defendant knew (he) (she) was not (authorized) (privileged) to do so.**
- 3. The property was (locked) (fenced) (enclosed) (shut) (secured against passage or entry).**

OR

- 3. There was a sign informing persons not to enter the property, which sign was placed in a manner reasonably to be seen.**

OR

- 3. The defendant was told (not to enter) (to leave) the property by the owner or other authorized person.**

OR

- 3. The defendant had been personally served with a restraining order prohibiting defendant from (entering into) (remaining on) the property.**

- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5808(a)(1). Criminal trespass is a class B, nonperson misdemeanor. Property under this section can be any land, nonnavigable body of water, structure, vehicle, aircraft or watercraft other than railroad property. Criminal trespass on railroad property

is a separate offense covered by K.S.A. 21-5809 and PIK 4th 58.160, Criminal Trespass on Railroad Property.

Comment

Before July 1, 2011 Revisions to Criminal Code

"Criminal trespass is not a lesser included offense of burglary under K.S.A. 21-3701(2)(d) because criminal trespass requires a proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice." *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 859 P.2d 387 (1994).

58.150

CRIMINAL TRESPASS—HEALTH CARE FACILITY

The defendant is charged with criminal trespass involving a health care facility. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant entered or remained (upon) (in) identify the public or private land or structure involved in a manner that interfered with access to or from a health care facility.**
- 2. The defendant knew (he) (she) was not (authorized) (privileged) to do so.**
- 3. The defendant entered or remained (upon) (in) such (land) (structure) in defiance of an order (not to enter) (to leave) the (land) (structure) personally communicated to defendant by (the owner of the health care facility) (an authorized person).**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5808(a)(2). Criminal trespass involving a health care facility is a class B, nonperson misdemeanor.

"Health care facility" means any licensed medical care facility, certificated health maintenance organization, licensed mental health center, or mental health clinic, licensed psychiatric hospital or other facility or office where services of a health care provider are provided directly to patients. K.S.A. 21-5808(c)(1).

"Health care provider" means any person: (A) licensed to practice a branch of the healing arts; (B) licensed to practice psychology; (C) licensed to practice professional or practical nursing; (D) licensed to practice dentistry; (E) licensed to practice optometry; (F) licensed to practice pharmacy; (G) registered to practice podiatry; (H) licensed as a social worker; or (I) registered to practice physical therapy. K.S.A. 21-5808(c)(2).

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58.160

CRIMINAL TRESPASS ON RAILROAD PROPERTY

The defendant is charged with criminal trespass on railroad property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant, without the consent of the owner or its agent, (entered) (remained) on railroad property.**
- 2. The defendant knew the property was railroad property.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction, "railroad property" includes any (train) (locomotive) (railroad car) (caboose) (rail mounted work equipment) (rolling stock) (safety device) (switch) (electronic signal) (microwave communication equipment) (connection) (railroad track) (rail) (bridge) (trestle) (right of way) (property owned, leased or possessed by a railroad company).

OR

- 1. The defendant caused a derailment of a (train) (railroad car) (rail mounted work equipment).**
- 2. The defendant did so recklessly.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-5809.

Violation of this section is a class A nonperson misdemeanor, except that, if the violation results in damage or loss in excess of \$1,500, the offense is a severity level 8, nonperson felony.

Subsection (c) of the statute provides that the statute shall not interfere with the lawful use of a private or public crossing.

Subsection (d) provides that nothing in the statute shall be construed as limiting a representative or member of a labor organization which represents or is seeking to represent the employees of the railroad, from conducting such business as provided under the railway labor act (45 U.S.C. 151, et sec.) and under other federal labor laws.

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58.170**ARSON**

The defendant is charged with arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly, by means of (fire) (an explosive), damaged insert one of the following:**
 - **(a building) (property) in which insert name had an interest, without the consent of insert name.**
 - or**
 - **(a building) (property) with intent to defraud (an insurer) (a lienholder).**

OR

- 1. The defendant accidentally damaged (a building) (property) by means of fire or explosive as a result of manufacturing or attempting to manufacture insert name of controlled substance.**

- [2. The property was a dwelling.]**

- 2. or 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5812(a). Bracketed Element No. 2 should be used if the property is a dwelling. Arson of a dwelling is a severity level 6, person felony. Arson of property that is not a dwelling is a severity level 7, nonperson felony. If the defendant accidentally damages a dwelling while manufacturing or attempting to manufacture a controlled substance, the crime is a severity level 7, person felony. If the damaged property is not a dwelling, the crime is a severity level 7, nonperson felony.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Comment

Before July 1, 2011 Revisions to Criminal Code

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

Under K.S.A. 21-3718(a)(1), the State must prove that the defendant knowingly damaged a building and that another person had some interest in that building. The State is not required to prove the defendant knew who owned the building. *State v. Powell*, 9 Kan. App. 2d 748, 687 P.2d 1375 (1984).

In *State v. Johnson*, 12 Kan. App. 2d 239, 738 P.2d 872, *rev. denied* 242 Kan. 905 (1987), the Court held that "any interest" as used in K.S.A. 21-3718(a)(1) includes a leasehold interest in real property.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

PIK 3d 59.20 was approved in *State v. Rodriguez*, 269 Kan. 633, 637, 8 P.3d 712 (2000).

58.180

AGGRAVATED ARSON

The defendant is charged with aggravated arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant committed arson by insert appropriate part(s) of PIK 4th 58.170 instruction.**
- 2. The (fire) (explosion) resulted in great bodily harm or disfigurement to (a firefighter) (law enforcement officer) in the course of (fighting) (investigating) the fire.**

OR

- 1. The defendant committed arson by insert appropriate part(s) of PIK 4th 58.170 instruction.**
 - 2. At the time there was a human being in the (building) (property).**
 - 3. The [(fire) (explosion)] [(resulted) (did not result)] in a substantial risk of bodily harm.**
- 3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5812(b). Aggravated arson which results in great bodily harm or disfigurement to a firefighter or law enforcement officer in the course of fighting or investigating the fire is a severity level 3, person felony. Aggravated arson committed upon a building or property in which there is a human being resulting in a substantial risk of bodily harm is a severity level 3, person felony. Aggravated arson committed upon a building or property in which there is a human being resulting in no substantial risk of bodily harm is a severity level 6, person felony.

When defendant has been charged with aggravated arson resulting in a substantial risk of bodily harm and there is an issue as to the seriousness of the risk, PIK 4th 68.080, Lesser Included Offenses, should also be given together with PIK 4th 68.110, Verdict Form.

Comment

Before July 1, 2011 Revisions to Criminal Code

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

A dead person is not a "human being" within the meaning of K.S.A. 21-3719. *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993).

In *State v. Johnson*, 12 Kan. App. 2d 239, 738 P.2d 872 *rev. denied* 242 Kan. 905 (1987), the Court held that "any interest" in K.S.A. 21-3718(a)(1) includes a leasehold interest in real property.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 21-3718) to mean "explosion."

58.190

CRIMINAL DAMAGE TO PROPERTY—WITHOUT CONSENT

The defendant is charged with criminal damage to property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name (was the owner of) (had an interest as a _____ in) insert description of property .
2. The defendant knowingly (damaged) (destroyed) (defaced) (substantially impaired the use of) property by means other than by fire or explosive.
3. The defendant did so without the consent of insert name .
4. The property was damaged to the extent of (\$25,000 or more) (at least \$1,000 but less than \$25,000) (less than \$1,000).
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5813(a)(1). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$1,000 but less than \$25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than \$1,000 or is of the value of \$1,000 or more and is damaged to the extent of less than \$1,000.

Where the extent of damage is in issue, PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

See PIK-Civil 4th, Chapter 171 for instructions as to property damage and value.

Comment

Before July 1, 2011 Revisions to Criminal Code

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than \$50, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

Criminal damage to property is not a lesser included offense of theft. *State v. Shoemaker*, 228 Kan. 572, 618 P.2d 1201 (1980).

It is doubtful if a charge under K.S.A. 21-3720(a)(1) is a lesser included offense of arson. Where the cause of damage is in issue, a charge in the alternative may be appropriate. Cases supporting this view are: *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974); *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate or required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

The sole distinction between Criminal damage to property, K.S.A. 21-3720 and Arson, K.S.A. 21-3718, is that arson proscribes knowingly damaging another person's property by means of fire or explosive and criminal damage to property proscribes willfully damaging another person's property by means other than by fire or explosive. That the damages to property of another was brought about by means other than by fire or explosive is an essential element of Criminal damage to property K.S.A. 21-3720. *Zapata v. State*, 14 Kan. App. 2d 94, 782 P.2d 1251 (1989).

In *State v. Jones*, 247 Kan. 537, 802 P.2d 533 (1990), the criminal damage to property involved the breaking of windows in a 1977 Dodge car. The Supreme Court held that, for purposes of determining if the offense was a felony or misdemeanor, the value of damage was the cost of replacement plus installation, not to exceed the total value of the car. Since the State failed to present evidence to establish the value of the car, the Supreme Court reversed the felony convictions of criminal damage to property.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

58.191

AGGRAVATED CRIMINAL DAMAGE TO PROPERTY

The defendant is charged with aggravated criminal damage to property.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name (was the owner of) (had an interest as a _____ in) insert appropriate property listed in K.S.A. 21-5813(b)(1-13) .
2. The defendant knowingly (damaged) (destroyed) (defaced) (substantially impaired the use of) the property by means other than by fire or explosive.
3. The defendant did so without the consent of insert name .
4. The value or amount of damage to the property exceeds \$5,000.00.
5. The damage was committed with the intent to obtain (insert regulated scrap metal as defined in K.S.A. 50-6,109(b)(2)) (insert item of regulated scrap metal property from list in K.S.A. 50-6,111(e)).
6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

In determining the amount of damage to property, damages may include the cost of repair or replacement of the property that was damaged, the reasonable cost of the loss of production, crops, and livestock, reasonable labor costs of any kind, reasonable material costs of any kind, and any reasonable costs that are attributed to equipment that is used to abate or repair the damage to the property.

Notes on Use

For authority, see K.S.A. 21-5813(b). Aggravated criminal damage to property is a severity level 6, nonperson felony.

See K.S.A. 21-5813(e) for definitions of property listed in K.S.A. 21-5813(b).

58.200

**CRIMINAL DAMAGE TO PROPERTY—WITH INTENT TO
DEFRAUD AN INSURER OR LIENHOLDER**

The defendant is charged with criminal damage to property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (damaged) (destroyed) (defaced) (substantially impaired the use of) insert type of property by means other than by fire or explosive.
2. Insert name of insurer or lienholder was (an insurer) (a lienholder) of the property.
3. The defendant did so with the intent to (injure) (defraud) insert name of insurer or lienholder.
4. The property was damaged to the extent of (\$25,000 or more) (at least \$1,000 but less than \$25,000) (less than \$1,000).
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5813(a)(2). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$1,000 but less than \$25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than \$1,000 or is of the value of \$1,000 or more and is damaged to the extent of less than \$1,000.

Where the extent of damage is in issue, PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

This instruction should not be used for K.S.A. 21-5813(a)(1).

See PIK-Civil 4th, Chapter 171 for instructions as to property damage and value.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 21-3718) to mean "explosion."

58.210

CRIMINAL USE OF EXPLOSIVES—COMMERCIAL

The defendant is charged with criminal use of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (possessed) (manufactured) (transported) insert description of explosive.
2. Insert description of explosive is a commercial explosive.

- [3. Defendant intended to use insert description of explosive to commit a crime.

OR

3. The defendant delivered insert description of explosive to insert name knowing that insert name intended to use it to commit a crime.

OR

3. A public safety officer was placed at risk to defuse insert description of explosive.

OR

3. Insert description of explosive was introduced into a building where a human being was present.]

3. or 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

If you find in claim Number 2 that insert description of explosive is a commercial explosive, it is not a defense to this crime that defendant did not know, or have reason to know, that it is.

A "commercial explosive" includes insert applicable portion of definition found at K.S.A. 21-5814(c)(2).

["Explosive" does not include insert applicable exception(s) found at K.S.A. 21-5814(c)(1).]

["Possession" means having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority and types of explosives, see K.S.A. 21-5814(a). Criminal use of explosives is a severity level 6, person felony, except that it is a severity level 5, person felony if: (a) the possession, manufacture or transportation is intended to be used to commit a crime or is delivered to another with knowledge that it is intended to be used by the deliverer to commit a crime, (b) a public safety officer is placed at risk to defuse the explosive, or (c) the explosive is placed in a building in which there is another human being.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

See also PIK 4th 63.110, Crimes Dealing With Explosives.

Comment

State v. Ingham, 308 Kan. 1466, 430 P.3d 931 (2018), discusses the trial court's omission of the C.F.R. definition which is referred to in the description of what "explosive" does not include in K.S.A. 21-5814(c)(1).

58.220

CRIMINAL USE OF EXPLOSIVES—SIMULATED

The defendant is charged with criminal use of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (possessed) (created) (constructed) a simulated insert description.**
- 2. Defendant did so with intent to intimidate or cause alarm to another person.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5814(a)(2). Possession of a simulated device of the type described in the statute is a severity level 8, person felony.

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58.230

AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL

The defendant is charged with aggravated tampering with a traffic signal. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly (manipulated) (altered) (destroyed) (removed) a insert type of traffic signal or device.
2. The insert type of traffic signal or device was for the purpose of controlling or directing the movement of (motor vehicles) (railroad trains) (aircraft) (watercraft).
3. The defendant's act created an unreasonable risk of an accident which (caused) (could have caused) the death of or great bodily injury to any person.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5817(b). Aggravated tampering with a traffic signal is a severity level 7, nonperson felony.

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58.240

CASTING AN OBJECT ONTO A STREET OR ROAD—BODILY INJURY

The defendant is charged with casting (an object) (objects) onto a _____. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant recklessly cast insert description of object (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]).
2. Insert name was on the (street) (road) (highway) (railroad right-of-way).
3. Insert name was injured as a result of the cast object.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5819(a)(3). Casting an object causing bodily injury is a severity level 7, nonperson felony.

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58.250

**CASTING AN OBJECT ONTO A STREET OR ROAD—DAMAGE
TO VEHICLE, RESULTING IN BODILY INJURY**

The defendant is charged with casting (an object) (objects) onto a _____. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant recklessly cast insert description of object onto a (street) (highway) (road) (railroad right-of-way).

OR

1. The defendant recklessly cast insert description of object upon any (vehicle) (engine) (car) (train) (locomotive) (railroad car) (caboose) (rail-mounted work equipment) (rolling stock) onto a (street) (road) (highway) (railroad right-of-way).
2. (A vehicle) (An engine) (A car) (A train) (A locomotive) (A railroad car) (A caboose) (Rail-mounted work equipment) (Rolling stock) was damaged.
3. Insert name was injured as a result of the (cast or thrown object) (damage to the vehicle in which [he] [she] was a passenger).
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5819(a)(4). Casting an object causing damage to a vehicle which results in bodily injury is a severity level 6, person felony.

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58.260

WORTHLESS CHECK

The defendant is charged with giving a worthless check. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. A (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to insert name.**

OR

- 1. A (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to insert name.**
- 2. The defendant knew that there were (no monies or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation.**
- 3. The defendant intended to defraud insert name.**
- 4. The amount of the (check) (order) (draft) was (\$25,000 or more) (at least \$[500] [1,000] but less than \$25,000) (less than \$[500] [1,000]).**
- 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5821. Giving a worthless check is a severity level 7, nonperson felony if the check is drawn for \$25,000 or more. Giving a worthless check is a severity level 9, nonperson felony if the check is drawn for at least \$1,000 but less than \$25,000, or if the person giving the worthless check has been convicted of giving a worthless check within five years immediately preceding commission of the crime. Giving a worthless check is a class A misdemeanor if the check is drawn for less than \$1,000.

If the amount of the check, order or draft is in issue, it will be necessary to include PIK 4th 58.480 in the jury instruction and to use PIK 4th 68.120, Verdict Form.

Defenses to the charge of giving a worthless check are set forth in PIK 4th 58.290, Worthless Check—Defenses.

If an issue exists as to whether the defendant had the intent to defraud and/or knowledge of insufficient funds in, or on deposit, and notice is claimed to have been given the defendant as provided by K.S.A. 21-5821(d), then PIK 4th 58.280, should be given and modified accordingly.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Comment

Before July 1, 2011 Revisions to Criminal Code

Presentation for payment at drawee bank is not an element of the offense. *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

Imprisonment for a worthless check offense does not violate either Section 16 in the Bill of Rights of the Kansas Constitution, or the Fourteenth Amendment to the United States Constitution. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Yost*, 232 Kan. 370, 654 P.2d 458 (1982).

For a discussion of the intent of the worthless check statute, K.S.A. 21-3707, what constitutes the gravamen of the offense and the proof required by the defendant to rebut the statutory presumption, see *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

In *State v. Ringi*, 238 Kan. 523, Syl. ¶¶ 1, 2, 712 P.2d 1223 (1986), the Court held: (1) "Under K.S.A. 1984 Supp. 21-3707, it is not necessary for the worthless check or draft to be used to obtain possession of money, merchandise or anything of value in order to constitute the crime of passing a worthless check," and (2) "The charge of theft by deception under K.S.A. 1984 Supp. 21-3707(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3703. A defendant may be charged with both offenses when they occur as separate transactions."

K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing, and delivering of any check, order, or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order, or draft in full upon its presentment. Under the facts of this case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged. *State v. Montgomery*, 14 Kan. App. 2d 577, 796 P.2d 559 (1990).

58.270

WORTHLESS CHECK—MULTIPLE

The defendant is charged with giving a worthless check more than once within a 7 day period. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. A (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to list as many recipients as are shown by the evidence to exist.

OR

1. A (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to list as many recipients as are shown by the evidence to exist.
2. The defendant knew that there were (no monies or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation.
3. The defendant intended to defraud list recipients.
4. The total amount of the (checks) (orders) (drafts) was (\$25,000 or more) (at least \$1,000 but less than \$25,000) (less than \$1,000).
5. These acts occurred between the _____ day of _____, _____, and the _____ day of _____, _____ in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5821. Giving a worthless check more than once within a seven day period is a severity level 7, nonperson felony if the combined total of the checks is \$25,000 or more and a severity level 9, nonperson felony if the combined total is at least \$1,000 but less than \$25,000.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

58.280

**STATUTORY INFERENCE OF INTENT TO
DEFRAUD—KNOWLEDGE OF INSUFFICIENT FUNDS**

You may infer that defendant had the intent to defraud and knowledge of insufficient funds in, or on deposit with a (bank) (credit union) (savings and loan association) (depository) when the defendant's (check) (order) (draft) has been refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds and:

- 1. defendant failed to pay the holder of the (check) (order) (draft) the amount due thereon and a lawful service charge for each (check) (order) (draft) within seven days after defendant received notice that the (check) (order) (draft) was not paid by the (bank) (credit union) (savings and loan association) (depository); or**
- 2. defendant postdated the (check) (order) (draft) without the knowledge and consent of the payee.**

[You may infer that the defendant received the notice that the (check) (order) (draft) was refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds when the notice was deposited as restricted matter in the United States mail, addressed to the defendant at the address which appeared on the (check) (order) (draft).]

The inference may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the defendant had the intent to defraud and knowledge of insufficient funds in, or on deposit with the (bank) (credit union) (savings and loan association) (depository). This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-5821(d). The bracketed paragraph should be used only when there is an issue as to the receipt of written notice given when deposited as restricted matter in the United States mail.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Comment

Before July 1, 2011 Revisions to Criminal Code

State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973), upheld the constitutionality of the statutory presumption of K.S.A. 21-3707(b) which enables the State to establish a *prima facie* case in a worthless check prosecution by proof of failure of payment by a defendant within seven days after notice of non-payment. For further discussion of the constitutionality of statutory presumptions, see *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), and Comment to PIK 3d 54.01 on the matter of shifting the burden on the defendant to produce evidence. A discussion of what constitutes "deposited as restricted matter in the United States mail" is found in *State v. Calhoun*, 224 Kan. 579, 581 P.2d 397 (1978).

State v. Powell, 220 Kan. 168, 551 P.2d 902 (1976), recognizes that K.S.A. 21-3707(b) is simply a permissive rule of evidence and does not add to the elements of the offense of giving a worthless check.

The mailing of a notice, by certified mail, restricted delivery, addressed to the maker of a check at the address shown thereon, although delivered to one other than the defendant, is sufficient to raise the rebuttable presumption provided by K.S.A. 21-3707(b). *State v. Calhoun*, *supra*.

Haremza is cited for the proposition that the statutory presumption created by K.S.A. 21-3707(b) can be rebutted by defendant's knowing that he or she had a reasonable expectation that the check would be paid on presentation. *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

58.290

WORTHLESS CHECK—DEFENSES

- A. It is a defense to the charge of giving a worthless (check) (order) (draft) if it was postdated and was presented for payment prior to the postdated date.**

OR

- B. It is a defense to the charge of giving a worthless (check) (order) (draft) if it was given to name of payee who had knowledge or had been informed when name of payee accepted the (check) (order) (draft), that name of maker did not have sufficient funds in the hands of name of drawee to pay such (check) (order) (draft) upon presentation, and the (check) (order) (draft) was presented for payment prior to the date name of maker informed the payee there would be sufficient funds.**

Notes on Use

For authority for "A," see K.S.A. 21-5821(e)(1); for authority for "B," see K.S.A. 21-5821(e)(2). If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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58.300

FORGERY—MAKING OR ISSUING A FORGED INSTRUMENT

The defendant is charged with forgery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant made, altered or endorsed a insert instrument so it appeared to have been [(made) (endorsed)] [(by insert name) (by insert name, a fictitious person) (at another time) (with different provisions) (by the authority of insert name, who did not give such authority)].

OR

1. The defendant issued or distributed a insert instrument which (he) (she) knew had been made, altered or endorsed so that it appeared to have been [(made) (endorsed)] [(by insert name) (by insert name, a fictitious person) (with different provisions) (by the authority of insert name, who did not give such authority)].
2. The defendant did this act with the intent to defraud.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5823(a)(1) and (2). Forgery is a severity level 8, nonperson felony. This instruction should not be used for K.S.A. 21-5823(a)(3).

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

K.S.A. 21-5823(c) provides that in any prosecution under 21-5823 it may be alleged in the complaint or information that it is not known whether a purported person is real or fictitious, and in such case there shall be a rebuttable presumption that such purported person is fictitious.

The PIK Committee recommends that whenever this presumption is applied in a forgery case, the jury be instructed in regard to the presumption as follows: "You may consider this presumption along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden of proof. This burden never shifts to the defendant." See generally, *State v. Colbert*, 26 Kan. App. 2d 177, 987 P.2d 1110 (1999), and *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983).

Comment

The Supreme Court in *State v. Ward*, 307 Kan. 245, 408 P.3d 954 (2018), held that a defendant's conduct is not required to pertain to his or her own business or affairs in order to sustain a conviction for making a false information, abrogating contrary language in *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990), and *State v. Gotti*, 273 Kan. 459, 43 P.3d 812 (2002).

Before July 1, 2011 Revisions to Criminal Code

In *State v. Norris*, 226 Kan. 90, 595 P.2d 1110 (1979), K.S.A. 21-3710(a)(1) and (2) were held to be constitutional against a claim of being vague and indefinite.

A valid debt or claim against the person whose name is forged is not a defense to a charge of forgery. *State v. Meyer*, 17 Kan. App. 2d 59, 832 P.2d 357 (1992).

58.310

FORGERY—POSSESSING A FORGED INSTRUMENT

The defendant is charged with forgery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant, with intent to defraud, possessed a insert instrument that (he) (she) knew had been made, altered or endorsed so that it appeared to have been [(made) (endorsed)] [(by insert name) (by insert name, a fictitious person) (at another time) (with different provisions) (by the authority of insert name, who did not give such authority)].
2. The defendant intended to issue or distribute the insert instrument.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5823(a)(3). Forgery is a severity level 8, nonperson felony. This instruction should not be used for K.S.A. 21-5823(a)(1) or (2).

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

58.320

MAKING FALSE INFORMATION

The defendant is charged with making false information. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant [(made) (generated) (distributed) (drew) (caused to be [made] [generated] [distributed] [drawn])] [(a written instrument) (electronic data) (an entry in a book of account)].**
- 2. The defendant knew that such information (falsely stated or represented some material matter) (was not what it purported to be).**
- 3. The defendant intended to (defraud) (obstruct the detection of a [theft] insert felony offense) (induce official action).**
- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5824. Making false information is a severity level 8, nonperson felony. The optional words and phrases should be used depending on the facts in the particular case.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Comment

The Supreme Court in *State v. Ward*, 307 Kan. 245, 408 P.3d 954 (2018), held that a defendant's conduct is not required to pertain to his or her own business or affairs in order to sustain a conviction for making a false information, abrogating contrary language in *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990), and *State v. Gotti*, 273 Kan. 459, 43 P.3d 812 (2002).

Before July 1, 2011 Revisions to Criminal Code

In *State v. Montgomery*, 14 Kan. App. 2d 577, 796 P.2d 559 (1990), the Court held that K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A.

21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing and delivering of any check, order or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order or draft in full upon its presentment. Under the facts of the case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged.

In a welfare fraud case, prosecution should be pursuant to the specific welfare fraud statute, K.S.A. 39-720, rather than the general statute for the crime of making a false writing, K.S.A. 21-3711. *State v. Wilcox*, 245 Kan. 76, 775 P.2d 177 (1989). The implications of *Wilcox* were considered in *State v. Jones*, 246 Kan. 180, 787 P.2d 738 (1990), and the court held that K.S.A. 39-720 had no application to a situation involving theft (K.S.A. 21-3701) from a program or agency not administered by the Department of Social and Rehabilitation Services.

Knowledge is an essential element of the offense of making a false writing under K.S.A. 21-3711. Knowledge means actual information that the writing falsely states or represents to some material matter and is intended to defraud or induce some official action. Information is considered material under K.S.A. 21-3711 if a reasonable person would attach importance to the information in choosing a course of action in the transaction in question. *State v. Edwards*, 250 Kan. 320, 826 P.2d 1355 (1992).

Intent to defraud, as set forth in K.S.A. 21-3711 and defined by K.S.A. 21-3110(9), requires that the maker of the false writing intended to deceive another person and to induce such person, in reliance upon the deception, to assume, create, transfer, alter, or terminate a right, obligation, or power with reference to property. The making of an instrument to cover up a theft, which crime is unknown to the victim, does not come within the statutory definition of "intent to defraud." *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

58.321

COUNTERFEITING CURRENCY

The defendant is charged with counterfeiting currency. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (made) (forged) (altered) any (note) (currency) (obligation) (security) of the United States with the intent to defraud.**

OR

- 1. The defendant (distributed) (possessed with the intent to distribute) any (note) (currency) (obligation) (security) of the United States knowing it had been (made) (forged) (altered) with the intent to defraud.**

OR

- 1. The defendant possessed (paper) (ink) (printer) (press) (currency plate) (computer) (insert other item) with the intent to (make) (forge) (alter) any (note) (currency) (obligation) (security) of the United States.**
- [2. The total face value of the (notes) (currency) (obligations) (securities) is (less than \$25,000) (\$25,000 or more).]**
- 3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5840. Counterfeiting currency is a severity level 8, nonperson felony if the total face value of the notes, currency, obligations or securities is less than \$25,000. If the total face value of the notes, currency, obligations or securities seized is \$25,000 or more, it is severity level 7, nonperson felony. Possessing items with the intent to make, forge, or alter any note, currency, obligation, or security of the United States is a severity level 9, nonperson felony.

The bracketed Element No. 2 is needed for the first two Element No. 1 alternatives, but not the third one.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

58.330

COUNTERFEITING MERCHANDISE OR SERVICES

The defendant is charged with counterfeiting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (manufactured) (used) (displayed) (advertised) (distributed) (possessed with the intent to distribute) certain describe item or service.
2. The defendant knew the describe item or service was identified by a counterfeit mark.
3. Insert name did not authorize the defendant to use the (trademark) (service mark) (trade name).
4. The retail value of the describe item or service (manufactured) (used) (displayed) (advertised) (distributed) (possessed with the intent to distribute) was (less than \$1,000) (at least \$1,000 but less than \$25,000) (\$25,000 or more).

OR

4. The number of describe item or service (manufactured) (used) (displayed) (advertised) (distributed) (possessed with the intent to distribute) was (more than 100 but less than 1,000) (1,000 or more).
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

In determining the quantity and retail value of the describe item or service, you should include the aggregate number and value of all (items) (services) identified by the (trademark) (service mark) (trade name) that the defendant (manufactured) (used) (displayed) (advertised) (distributed) (possessed with the intent to distribute).

Notes on Use

For authority, see K.S.A. 21-5825. Counterfeiting of items or services with a retail value of less than \$1,000 is a class A nonperson misdemeanor. Counterfeiting of items or services with a retail value of at least \$1,000 but less than \$25,000, or which involves more than 100 but less than 1,000 items bearing a counterfeit mark, or on a second violation is a severity level 9 nonperson felony. Counterfeiting of items or services with a retail value of \$25,000 or more, or which involves 1,000 or more items bearing a counterfeit mark, or on a third or subsequent violation is a severity level 7, nonperson felony.

58.340

**COUNTERFEITING MERCHANDISE OR SERVICES—VALUE
OR UNITS IN ISSUE**

The State has the burden to prove the (retail value of the goods or services) (number of items) allegedly counterfeited by the defendant.

The State claims that the (retail value) (number of items) involved herein is insert value or number of items.

It is for you to determine the (retail value) (number of items) and enter it on the verdict form furnished.

Notes on Use

It is necessary to use this instruction with PIK 4th 68.130, Verdict Form—Counterfeiting Merchandise or Services—Value or Units in Issue, when an issue exists. The appropriate alternative should be used and the retail value or number of units involved inserted in the blank.

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58.350**DESTROYING A WRITTEN INSTRUMENT**

The defendant is charged with destroying a written instrument. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (tore) (cut) (burned) (erased) (obliterated) (destroyed) a written instrument, in whole or in part.**
- 2. The defendant did so with the intent to defraud.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5826. Destroying a written instrument is a severity level 9, nonperson felony.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

58.360

CRIMINAL USE OF FINANCIAL CARD OF ANOTHER

The defendant is charged with criminal use of a financial card of another. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant used a _____ financial card.**
 - 2. The cardholder, insert name, had not consented to the use of the financial card by the defendant.**
 - 3. The defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services).**
 - 4. The defendant did so with the intent to defraud.**
 - 5. The financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$1,000 but less than \$25,000) (less than \$1,000).**
 - 6. These acts occurred between _____, _____, and _____, _____ in _____ County, Kansas.**
- OR**
- 6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5828(a)(1). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$1,000 but less than \$25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than \$1,000.

Use the first alternative Element No. 6 if the case involves multiple uses of a financial card. Use the second alternative Element No. 6 if the case involves a single use.

If value is in issue, use PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-5828(c)(1) and (2), respectively. For a definition of "intent to defraud," see K.S.A. 21-5111(o).

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require a modification of the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

Using the number taken off a stolen financial card constitutes criminal use of a financial card as prohibited by K.S.A. 21-3729(a)(1). *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

58.370

CRIMINAL USE OF CANCELLED FINANCIAL CARD

The defendant is charged with criminal use of a financial card which had been revoked or cancelled. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant used _____, a financial card or number which had been revoked or cancelled.**
 - 2. The defendant had received written notice that the financial card was revoked or cancelled.**
 - 3. The defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services).**
 - 4. The defendant did so with the intent to defraud.**
 - 5. The financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$1,000 but less than \$25,000) (less than \$1,000).**
 - 6. These acts occurred between _____, _____, and _____, _____ in _____ County, Kansas.**
- OR**
- 6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5828(a)(2). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$1,000 but less than \$25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than \$1,000.

Use the first alternative Element No. 6 if the case involves multiple uses of a financial card. Use the second alternative Element No. 6 if the case involves a single use.

If value is in issue, use PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-5828(c)(1) and (2), respectively. For a definition of "intent to defraud," see K.S.A. 21-5111(o).

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require a modification of the instruction.

58.380

**CRIMINAL USE OF ALTERED OR NONEXISTENT
FINANCIAL CARD**

The defendant is charged with criminal use of a financial card which had been (altered) (nonexistent). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant used a _____ financial card that had been (falsified) (mutilated) (altered).**

OR

- 1. The defendant used a nonexistent financial card number as if the same were a valid financial card number.**
- 2. The defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services).**
- 3. The defendant did so with the intent to defraud.**
- 4. The financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$1,000 but less than \$25,000) (less than \$1,000).**

- 5. These acts occurred between _____, _____, and _____, in _____ County, Kansas.**

OR

- 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5828(a)(3). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$1,000 but less than \$25,000.

Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than \$1,000.

Use the first alternative Element No. 5 if the case involves multiple uses of a financial card. Use the second alternative Element No. 5 if the case involves a single use.

If value is in issue, use PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-5828(c)(1) and (2), respectively. For a definition of "intent to defraud," see K.S.A. 21-5111(o).

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require a modification of the instruction.

58.390

IMPAIRING A SECURITY INTEREST—CONCEALMENT OR DESTRUCTION

The defendant is charged with impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (damaged) (destroyed) (concealed) insert description of property.
2. Insert description of property was security for a debt owed to insert name.
3. The defendant intended to defraud the secured party.
4. The property subject to the security interest (is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more) (is of the value of at least \$1,000 and either the value of the property or the security interest is less than \$25,000) (is of the value of less than \$1,000, or of the value of \$1,000 or more but subject to a security interest of less than \$1,000).
5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5830(a)(1). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least \$1,000 and is subject to a security interest of at least \$1,000 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than \$1,000, or of the value of \$1,000 or more but subject to a security interest of less than \$1,000.

K.S.A. 21-5830 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-5830(a)(2) or (3).

In the prosecution for impairing a security interest by concealment or destruction, it is necessary to provide the jury with the alternative of finding misdemeanor impairing security interest by concealment or destruction if value of the amount of the security interest is in issue. PIK 4th 68.120, Verdict Form—Value in Issue and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

58.400

IMPAIRING A SECURITY INTEREST—SALE OR EXCHANGE

The defendant is charged with impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (sold) (exchanged) (disposed of) insert description of property.
2. The defendant knew insert description of property was security for a debt owed to insert name.
3. The defendant (sold) (exchanged) (disposed of) the property with intent to defraud the secured party.
4. The security agreement did not authorize the (sale) (exchange) (disposal) of insert description of property.
5. Insert name did not consent in writing to the (sale) (exchange) (disposal) of insert description of property.
6. The property subject to the security interest (was of the value of \$25,000 or more and was subject to a security interest of \$25,000 or more) (was of the value of at least \$1,000 and either the value of the property or the security interest was less than \$25,000) (was of the value of less than \$1,000, or of the value of \$1,000 or more but subject to a security interest of less than \$1,000).
7. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5830(a)(2). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least \$1,000 and is subject to a security interest of at least \$1,000 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than \$1,000, or of the value of \$1,000 or more but subject to a security interest of less than \$1,000.

K.S.A. 21-5830 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-5830(a)(1) or (3).

In the prosecution for impairing a security interest by sale or exchange, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 4th 68.120, Verdict Form—Value in Issue and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

The Committee believes that the value of the security interest should be determined by the balance due under the security agreement.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

58.410

IMPAIRING A SECURITY INTEREST—FAILURE TO ACCOUNT

The defendant is charged with impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name had a security interest in insert description of property.
2. The defendant (sold) (exchanged) (disposed of) insert description of property and received insert description of proceeds.
3. The security agreement required that in the event of the (sale) (exchange) (disposal) of insert description of property, the proceeds were to be given to insert name.
4. The defendant with intent to defraud failed to account for the ([proceeds] [collateral]) ([within a reasonable time] [as specified in the security agreement]).
5. The property subject to the security interest (was of the value of \$25,000 or more and was subject to a security interest of \$25,000 or more) (was of the value of at least \$1,000 and either the value of the property or the security interest was less than \$25,000) (was of the value of less than \$1,000, or of the value of \$1,000 or more but subject to a security interest of less than \$1,000).
6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5830(a)(3). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairment of a security interest is a severity level 9, nonperson felony when the property subject to the security interest is of the value of at least \$1,000 and is subject to a security interest of at least \$1,000 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor if the property subject to a security interest is of the value of less than \$1,000, or of the value of \$1,000 or more but subject to a security interest of less than \$1,000.

K.S.A. 21-5830 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-5830(a)(1) or (2).

See K.S.A. 84-1-204 which allows a reasonable time to account if no specific time is fixed in the security agreement.

In the prosecution for impairing a security interest by failure to account, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security interest is in issue. PIK 4th 68.120, Verdict Form—Value in Issue and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

58.420

WAREHOUSE RECEIPT FRAUD—ORIGINAL RECEIPT

The defendant is charged with warehouse receipt fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman).**
- 2. The defendant (made) (drew) (issued) (delivered) a warehouse receipt for goods.**

OR

- 2. The defendant caused or directed a warehouse receipt to be (made) (drawn) (issued) (delivered) for goods.**
- 3. The defendant knew that the goods shown on the receipt had not been received by (him) (her) at the time (he) (she) issued the receipt.**

OR

- 3. The defendant knew that the goods shown on the receipt were not under (his) (her) actual control at the time (he) (she) issued the receipt.**

OR

- 3. The defendant knew that the receipt contained a false statement.**
- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5831(a)(1) and (2). Warehouse receipt fraud is a severity level 10, nonperson felony.

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58.430

**WAREHOUSE RECEIPT FRAUD—DUPLICATE OR
ADDITIONAL RECEIPT**

The defendant is charged with warehouse receipt fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman).**
- 2. The defendant (made) (drew) (issued) (delivered) a duplicate or additional warehouse receipt for goods without placing on its face the word "duplicate".**

OR

- 2. The defendant caused or directed a duplicate or additional warehouse receipt to be (made) (drawn) (issued) (delivered) for goods without placing on its face the word "duplicate".**
- 3. The defendant knew that there was an uncanceled and outstanding receipt for the same goods.**
- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5831(a)(3). Warehouse receipt fraud is a severity level 10, nonperson felony.

K.S.A. 21-5831(a)(3) provides for an exception in the case of a lost, stolen or destroyed receipt after proceedings as provided in K.S.A. 34-257 or 84-7-601(a). Since K.S.A. 34-257 was repealed, L. 1967, ch. 235, § 2, it would appear that the statute referred to is K.S.A. 34-257a.

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58.440

CONDUCTING A PYRAMID PROMOTIONAL SCHEME

The defendant is charged with conducting a pyramid promotional scheme. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (established) (operated) (advertised) (promoted) a pyramid promotional scheme.**
- 2. The defendant did so knowingly.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction, "pyramid promotional scheme" means any plan or operation by which a participant gives consideration for the opportunity to receive compensation which is derived primarily from any person's introduction of other persons into participation in the plan or operation rather than from the sale of goods, services or intangible property by the participant or other persons introduced into the plan or operation.

[A limitation as to the number of persons who may participate or the presence of additional conditions affecting eligibility for the opportunity to receive compensation under the plan or operation does not change the identity of the scheme as a pyramid promotional scheme.]

[It is not a defense that a participant, on giving consideration, obtains any goods, services or intangible property in addition to the right to receive compensation.]

Notes on Use

For authority, see K.S.A. 21-5838(a).

Violation of the Act is a severity level 9, nonperson felony.

The bracketed paragraph(s) should be used only if the issue is raised.

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58.450

COMPUTER CRIME

The defendant is charged with computer crime. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly and without authority gained access to and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) (property).**

OR

- 1. The defendant used a (computer) (computer system) (computer network) (property) for the purpose of (devising) (executing) a (scheme) (artifice) with the intent to defraud or for the purpose of obtaining (money) (property) (services) or any other thing of value by means of false or fraudulent pretense or representation.**

OR

- 1. The defendant knowingly exceeded the limits of authorization and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) (property).**
- [2. The amount of the loss was more than \$100,000.]**
- 2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5839(a)(1), (2), and (3). Computer crime is now a severity level 8, nonperson felony, except a violation is a severity level 5, nonperson felony if the amount of the loss is more than \$100,000.

The optional words and phrases should be used as required in the particular case. When using the "property" alternative in Element No. 1, give the definition of "property" found in K.S.A. 21-5839(c)(8). For a definition of "intent to defraud," see K.S.A. 21-5111(o).

If warranted, PIK 4th 58.470, Computer Crime—Defense, should be given.

Comment

Before July 1, 2011 Revisions to Criminal Code

The words "modifying," "altering," and "copying" as used in K.S.A. 21-3755(b)(1)(C), which defines computer crimes, do not make the statute unconstitutionally vague. *State v. Rupnick*, 280 Kan. 720, 125 P.3d 541 (2005).

58.460

COMPUTER TRESPASS

The defendant is charged with computer trespass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant disclosed a (number) (code) (password) (insert other means of access) to a (computer) (computer network) (social networking website) (personal electronic content).**

OR

- 1. The defendant (accessed) (attempted to access) a (computer) (computer system) (computer network) (social networking website) (computer software) (computer program) (computer documentation) (computer data) (computer property contained in a computer, computer system or computer network).**
- 2. The defendant did so knowingly and without authorization.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5839(a)(4) and (5). Computer trespass is a class A, nonperson misdemeanor.

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require a modification of the instruction.

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58.470

COMPUTER CRIME—DEFENSE

It is a defense to this charge if the defendant appropriated the property or services openly and under a claim of title made in good faith.

Notes on Use

For authority, see K.S.A. 21-5839(c). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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58.480

VALUE IN ISSUE

The State has the burden of proof as to the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s]) (which the defendant allegedly [obtained] [damaged] [impaired] [gave]) (over which the defendant allegedly [obtained] [exerted] unauthorized control).

The State claims that the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s]) was insert dollar amount.

It is for you to determine the amount and enter it on the verdict form furnished.

Notes on Use

When an issue of value exists, it is necessary to use this instruction with PIK 4th 68.120, Verdict Form—Value in Issue. The appropriate alternative should be used and dollar amount inserted in the blanks.

For authority, see *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975); *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977); *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Stephens*, 263 Kan. 658, 953 P.2d 1373 (1998), the court held that the degree of a theft crime is determined by the value of the property stolen. The value of what the victim received or the extent of the victim's loss is immaterial in making that determination. The value issue is discussed in great detail in the opinion. On this issue, see also *State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985).

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59.010

PERJURY

The defendant is charged with perjury. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant intentionally and falsely (swore) (testified) (affirmed) (declared) (subscribed) to a material fact upon oath or affirmation legally administered [in any (cause) (matter) (proceeding) before any (court) (tribunal) (public body) (notary public)] [before an officer authorized to administer oaths].

OR

1. The defendant intentionally and falsely subscribed as true and correct under penalty of perjury any material matter in any unsworn, written, and signed (declaration) (verification) (certificate) (statement).
2. The (declaration) (verification) (certificate) (statement) includes a statement that is substantially in the following form:
insert one of the following:

- I (declare) (verify) (certify) (state) under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct. Executed on (date).
- or
- I (declare) (verify) (certify) (state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

OR

1. The defendant intentionally and falsely subscribed as true and correct under penalty of perjury the required statement on an advance ballot envelope on behalf of a person physically unable to sign the envelope.

2. The statement subscribed to on the envelope was in the following form:

“My signature constitutes an affidavit that the person for whom I signed the envelope is a person who is physically unable to sign such envelope. By signing this envelope, I swear this information is true and correct, and that signing an advance ballot envelope under false pretenses shall constitute the crime of perjury.”

2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5903, 53-601, and 25-1121. Perjury under the first alternative in this instruction is a severity level 9, nonperson felony, unless the false statement is made in the trial of a felony charge. In that case it is a severity level 7, nonperson felony. Perjury is a severity level 9, nonperson felony if the false statement is made in a cause, matter or proceeding other than the trial of a felony charge or is made under penalty of perjury in any declaration, verification, certificate or statement as provided in K.S.A. 53-601 and the second and third alternatives. In the second alternative, use the first bulleted paragraph for documents executed outside the state of Kansas and the second bulleted paragraph for documents executed within Kansas. It is the Committee's belief that whether or not a document is subject to the provisions of K.S.A. 53-601 is a question of law that should be addressed prior to trial.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Bingham*, 124 Kan. 61, 257 Pac. 951 (1927), it was held that the question of whether false testimony is material in a perjury case is to be determined as a question of law by the trial court and not as a question of fact by the jury. In order to constitute perjury under the statute, it is essential that the false testimony be on a material matter. The false statements relied upon, however, need not bear directly on the ultimate issue to be determined; it is sufficient if they relate to collateral matters upon which evidence would have been admissible. For cases related to this subject, see *State v. Elder*, 199 Kan. 607, 433 P.2d 462 (1967); *State v. Frames*, 213 Kan. 113, 119, 515 P.2d 751 (1973); *State v. Edgington*, 223 Kan. 413, 573 P.2d 1059 (1978).

However, in *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995), the Court held the element of materiality in a perjury prosecution under 18 U.S.C. § 1001 must be resolved by a jury and the trial judge's refusal to submit the question of materiality to

the jury was violative of the defendant's Fifth and Sixth Amendment rights. It was also noted in *Gaudin* that the parties agreed upon the following definition of "materiality":

"the statement must have a natural tendency to influence, or be capable of influencing, the decision of the decision making body to which it was addressed."

In *State v. Rollins*, 264 Kan. 466, 957 P.2d 438 (1998), the court reiterated that the materiality of a false statement under K.S.A. 21-3805 is a question of law for the judge and not a question of fact for the jury. The court distinguished the holding in *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995), construing 18 U.S.C. § 1008 (1988).

The rule requiring two witnesses or one witness and corroborating circumstances to prove perjury is inapplicable to the crime of solicitation to commit perjury. *State v. Ellis*, 25 Kan. App. 2d 61, 957 P.2d 520 (1998).

Kansas appellate courts will not infer a private cause of action when a statute provides criminal penalties but does not mention civil liability. Accordingly, there is no civil cause of action for perjury. *Droge v. Rempel*, 39 Kan. App. 2d 455, 180 P.3d 1094 (2008).

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59.020

**INTERFERENCE WITH LAW ENFORCEMENT—
FALSE REPORTING****A. *False Reporting With Intent That Law Enforcement Act in Reliance:***

The defendant is charged with interference with law enforcement by false reporting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant falsely reported to a (law enforcement officer) (law enforcement agency) (state investigative agency) insert one of the following :
 - that a particular person committed a crime.
or
 - that a law enforcement officer has (committed a crime) (committed misconduct in the performance of the officer's duties).
or
 - any information concerning the (death) (disappearance) (potential death) (potential disappearance) of a child less than 13 years old.
2. The defendant knew that information was false.
3. The defendant intended that the (officer) (agency) would act in reliance on that information.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

B. *False Reporting With Intent to Influence/Obstruct Law Enforcement Duty:*

The defendant is charged with interference with law enforcement by false reporting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant falsely reported information to a (law enforcement officer) (law enforcement agency) (state investigative agency).**
- 2. The defendant knew the information was false.**
- 3. The defendant intended to (influence) (impede) (obstruct) the (officer's) (agency's) duty.**
- 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5904(a)(1). The statute draws distinctions in the crime of false reporting based on (1) the information falsely reported and (2) the intent with which the information is falsely reported.

Falsely reporting that a particular person committed a crime is a class A, nonperson misdemeanor in the case of a misdemeanor, and a severity level 8, nonperson felony in the case of a felony.

Falsely reporting that a crime has been committed or any information concerning a crime or suspected crime is a class A misdemeanor.

Falsely reporting any information concerning the death, disappearance, or potential death or disappearance of a child less than 13 years old is a severity level 8, nonperson felony.

Falsely reporting any information to influence, impede, or obstruct the duty of law enforcement is a class A misdemeanor.

In *State v. Seabury*, 267 Kan. 431, 985 P.2d 1162 (1999), with respect to the obstruction of official duty statute, the court held that "in the case of a felony" meant an underlying felony is required (either felony charges have been filed or there has been a felony committed) before a defendant can be charged with the felony level of the crime. A traffic infraction has been found to be insufficient to support the felony level of obstructing official duty. *State v. Kelley*, 38 Kan. App. 2d 224, 162 P.3d 832 (2007).

Law enforcement officer is defined in K.S.A. 21-5111(p).

59.021

INTERFERENCE WITH LAW ENFORCEMENT—EVIDENCE

The defendant is charged with interference with law enforcement by interfering with evidence. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (concealed) (destroyed) (materially altered) evidence.**
- 2. The defendant did so with the intent to prevent or hinder the apprehension or prosecution of a person for a (misdemeanor) (felony).**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5904(a)(2). Interference with law enforcement by interference with evidence is a class A, nonperson misdemeanor in the case of a misdemeanor, and a severity level 8, nonperson felony in the case of a felony.

In *State v. Seabury*, 267 Kan. 431, 985 P.2d 1162 (1999), with respect to the obstruction of official duty statute, the court held that "in the case of a felony" meant an underlying felony is required (either felony charges have been filed or there has been a felony committed) before a defendant can be charged with the felony level of the crime. A traffic infraction has been found to be insufficient to support the felony level of obstructing official duty. *State v. Kelley*, 38 Kan. App. 2d 224, 162 P.3d 832 (2007).

59.030

INTERFERENCE WITH LAW ENFORCEMENT—OBSTRUCTING LEGAL PROCESS

The defendant is charged with interference with law enforcement by obstructing legal process. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was authorized by law to insert authorized act.
2. The defendant knowingly (obstructed) (resisted) (opposed) insert name in the (service of) (execution of) (attempt to serve) (attempt to execute) the insert name of document or instrument.
3. At the time the defendant knew or should have known that insert name was authorized by law to insert authorized act.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5904(a)(3). The "knew or should have known" requirement in Element No. 3 comes from the Kansas Supreme Court's interpretation of the word "knowingly" in the statute. See *State v. Gasser*, 223 Kan. 24, 574 P.2d 146 (1977) and *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984).

But see *State v. Murrin*, 309 Kan. 385, 399, 435 P.3d 1126 (2019), a case involving interference with discharge of official duty. The trial court's element instruction was consistent with PIK 4th 59.040, including the requirement that the State prove the defendant knew or should have known that the person he was dealing with was a law enforcement officer. The Supreme Court noted that this requirement of proof had been judicially crafted prior to criminal recodification in 2011. The Court then stated, "Even if we would question the propriety of the judicial enhancement today, as this case was instructed on the interference charge, it was error for the judge not to instruct on voluntary intoxication as a potential defense."

K.S.A. 21-5904(a)(3) describes two different kinds of interfering with law enforcement: a) obstructing the service or execution of a writ, warrant, process, or order of a court; and b) obstructing in the discharge of any official duty. The Committee believes that PIK 4th 59.030 should be used when the offense charged is obstructing the service or execution of a writ, warrant, process or court order, and PIK 4th 59.040 should be used when the offense charged is obstructing an officer in the discharge of any other official duty.

The prior Notes on Use suggested that PIK 3d 60.08 should be used if the officer obstructed was not in uniform and PIK 3d 60.09 should be used if the officer was uniformed. This suggestion was derived from *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992) and *State v. Timley*, 25 Kan. App. 2d 779, 785-86, 975 P.2d 264 (1998). The Committee cannot find any support in either the prior or current version of the statute for the proposition that the officer's dress, rather than the officer's function, should determine which instruction is used. The Committee therefore recommends that PIK 4th 59.030 should be used when the officer was serving or executing a writ, warrant, process or court order, and PIK 4th 59.040 should be used when the officer was engaged in discharging some other official duty.

Fill in the first blank in Element No. 1 with the officer's or process server's name and the second blank with the particular act the person was authorized to perform. In Element No. 2, fill in the first blank with the officer's or process server's name and the second blank with the document or instrument being served.

Interfering with law enforcement by obstructing legal process is a severity level 9, nonperson felony in the case of a felony, or resulting from parole or any authorized disposition for a felony. It is a class A misdemeanor in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or in a civil case.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Hatfield*, 213 Kan. 832, 518 P.2d 389 (1974), the Court held that obstructing legal process or official duty included any willful act which obstructs or resists or opposes an officer in the discharge of his official duty and does not necessarily require the employment of direct force or the exercise of direct means.

It was held in *State v. Timley*, 25 Kan. App. 2d at 786, that a felony arrest without a warrant is not legal process as defined in K.S.A. 21-3808.

In *State v. Seabury*, 267 Kan. 431, 985 P.2d 1162 (1999), the court held that obstructing the execution of a search warrant is a misdemeanor.

In a case where a defendant asked the court to use an instruction that mixed elements from PIK 3d 60.08 and 60.09, the Court of Appeals held that such an instruction was invited error that could not be the subject of an appeal. *State v. McCoy*, 34 Kan. App. 2d 185, 189, 116 P.3d 48 (2005).

Whether obstruction of justice should be charged as a felony or misdemeanor depends on the officer's reason for approaching the defendant, not on the defendant's status. *State v. Johnson*, 40 Kan. App. 2d 196, 190 P.3d 995 (2008) *rev. denied* 287 Kan. 767 (2009); *State v. Kelly*, 38 Kan. App. 2d 224, 227, 162 P.3d 832 (2007).

59.040

**INTERFERENCE WITH LAW ENFORCEMENT—OBSTRUCTING
OFFICIAL DUTY**

The defendant is charged with interference with law enforcement by obstructing official duty. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was discharging an official duty, namely insert official duty.
2. The defendant knowingly (obstructed) (resisted) (opposed) insert name in discharging that official duty.
3. The act of the defendant substantially hindered or increased the burden of the officer in the performance of the officer's official duty.
4. At the time the defendant knew or should have known that insert name was a law enforcement officer.
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5904(a)(3). The "knew or should have known" requirement in Element No. 3 comes from the Kansas Supreme Court's interpretation of the word "knowingly" in the statute. See *State v. Gasser*, 223 Kan. 24, 574 P.2d 146 (1977) and *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984).

But see *State v. Murrin*, 309 Kan. 385, 399, 435 P.3d 1126 (2019), a case involving interference with discharge of official duty. The trial court's element instruction was consistent with PIK 4th 59.040, including the requirement that the State prove the defendant knew or should have known that the person he was dealing with was a law enforcement officer. The Supreme Court noted that this requirement of proof had been judicially crafted prior to criminal recodification in 2011. The Court then stated, "Even if we would question the propriety of the judicial enhancement today, as this case was instructed on the interference charge, it was error for the judge not to instruct on voluntary intoxication as a potential defense."

K.S.A. 21-5904(a)(3) describes two different kinds of interfering with law enforcement: a) obstructing the service or execution of a writ, warrant, process, or order of a court; and b) obstructing in the discharge of any official duty. The Committee believes that PIK 4th 59.030 should be used when the offense charged is obstructing the service or execution of a writ, warrant, process or court order, and PIK 4th 59.040 should be used when the offense charged is obstructing an officer in the discharge of any other official duty.

The prior Notes on Use suggested that PIK 3d 60.08 should be used if the officer obstructed was not in uniform and PIK 3d 60.09 should be used if the officer was uniformed. This suggestion was derived from *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992) and *State v. Timley*, 25 Kan. App. 2d 779, 785-86, 975 P.2d 264 (1998). The Committee cannot find any support in either the prior or current version of the statute for the proposition that the officer's dress, rather than the officer's function, should determine which instruction is used. The Committee therefore recommends that PIK 4th 59.030 should be used when the officer was serving or executing a writ, warrant, process or court order, and PIK 4th 59.040 should be used when the officer was engaged in discharging some other official duty.

Fill in the blanks in Element Nos. 1, 2 and 4 with name of the officer whose discharge of duty was obstructed.

The requirement of "substantial hindrance" is not in the statute. It derives from a long line of common law cases that are reviewed and confirmed in *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984).

Interference with law enforcement by obstructing official duty is a severity level 9, nonperson felony in the case of a felony, or resulting from parole or any authorized disposition for a felony. It is a class A misdemeanor in the case of a misdemeanor or a civil case.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Gasser*, 223 Kan. 24, 30, 574 P.2d 146 (1977), it is held that a defendant who runs from a federal officer assisting state law enforcement officials in an arrest for state theft charges has obstructed official duty of a law enforcement official. To sustain a conviction under K.S.A. 21-3808, it is necessary that the State prove the defendant had reasonable knowledge that the person he or she opposed was a law enforcement official.

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), it was held that K.S.A. 21-3808 encompasses illegal obstruction by any means including oral statements.

Whether underlying charge is denominated obstruction of duty or obstruction of process, if there is a uniformed and properly identified law enforcement officer, PIK 3d 60.09 should be given, not PIK 3d 60.08. *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

In *State v. Dalton*, 21 Kan. App. 2d 50, 895 P.2d 204 (1995), the defendant opposed arrest under a warrant issued for violation of a felony diversion agreement. It was held defendant's conviction for Obstructing Legal Process or Official Duty was proper.

In *State v. Hudson*, 261 Kan. 535, 931 P.2d 679 (1997), the court held that the classification of obstruction as a felony or misdemeanor depends upon the knowledge and intent of the officer as to whether a misdemeanor or felony arrest was being made. See also *State v. Kelly*, 38 Kan. App. 2d 224, 227, 162 P.3d 832 (2007); *State v. Johnson*, 40 Kan. App. 2d 196, 190 P.3d 995 (2008).

It was held in *State v. Timley*, 25 Kan. App. 2d at 786, that a felony arrest without a warrant is not legal process as defined in K.S.A. 21-3808.

In *State v. Seabury*, 267 Kan. 431, 985 P.2d 1162 (1999), the court held that obstructing the execution of a search warrant is a misdemeanor.

An instruction on the elements of an underlying felony is unwarranted when all the instructions coupled with the evidence at trial clearly specify the crime charged. Use of PIK 3d 60.09 is favored when the State charges obstruction of an officer in the discharge of his or her duties. *State v. Scott*, 28 Kan. App. 2d 418, 17 P.3d 966 (2001).

In a case where a defendant asked the court to use an instruction that mixed elements from PIK 3d 60.08 and 60.09, the Court of Appeals held that such an instruction was invited error that could not be the subject of an appeal. *State v. McCoy*, 34 Kan. App. 2d 185, 189, 116 P.3d 48 (2005).

59.050

INTERFERENCE WITH JUDICIAL PROCESS

The defendant is charged with interference with judicial process. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant communicated with a (judge) (magistrate) (master) (juror) about a matter which (had been) (might be) brought before the (judge) (magistrate) (master) (juror).**
- 2. The defendant intended to improperly influence the (judge) (magistrate) (master) (juror).**

OR

- 1. The defendant insert one of the following:**
 - communicated in any manner a threat of violence to any (judge) (magistrate) (master) (juror) (prosecutor).**
or
 - harassed a (judicial officer) (prosecutor) by repeated abusive communications.**
or
 - (picketed) (paraded) (demonstrated) near a (judge's) (magistrate's) (master's) (juror's) (prosecutor's) residence or place of abode.**
or
 - (picketed) (paraded) (demonstrated) in or near a building housing a (judge) (magistrate) (master) (juror) (prosecutor).**
- 2. This act was done with the intent to influence, impede or obstruct the (finding) (decision) (ruling) (order) (judgment) (decree) of the (judge) (magistrate) (master) (juror) (prosecutor) on any matter then pending before the (judge) (magistrate) (master) (juror) (prosecutor).**

OR

1. The defendant knowingly (accepted) (agreed to accept) something of value in exchange for a promise insert one of the following:
 - not to initiate or aid in the prosecution of a person who has committed a crime.
 - or
 - to conceal or destroy evidence of a crime.

OR

1. The defendant knowingly or intentionally, in a criminal (proceeding) (investigation) insert one of the following:
 - induced (a witness) (an informant) to withhold or unreasonably delay in producing any testimony, information, document, or thing.
 - (withheld) (unreasonably delayed in producing) any testimony, information, document, or thing after a court ordered the production of the testimony, information, document, or thing.
 - (altered) (damaged) (removed) (destroyed) a record, document, or thing with the intent to prevent it from being produced or used as evidence.
 - (made) (presented) (used) a false record, document, or thing that was material to the criminal (proceeding) (investigation) appear in evidence to mislead a (justice) (judge) (magistrate) (master) (law enforcement officer).

OR

1. The defendant had been summoned or sworn as a juror and insert one of the following:
 - intentionally (solicited) (accepted) (agreed to accept) a benefit in exchange for wrongfully giving a verdict for or against any party in a civil or criminal proceeding.
 - or

- intentionally (promised) (agreed) to wrongfully give a verdict for or against any party in a civil or criminal trial.
- or
- knowingly received evidence or information about a matter for which the juror was called, without the authority of the court before whom the juror was summoned, and without immediately disclosing the information to the court.

OR

1. The defendant knowingly made available by any means personal information about (a judge) (a judge's immediate family member).
2. The dissemination of such personal information posed an imminent and serious threat to the (judge's safety) (safety of the judge's immediate family member).
3. The defendant (knew) (reasonably should have known) that dissemination of the information posed an imminent and serious threat.

2. or 3. or 4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Judge" means any duly elected or appointed justice of the supreme court, judge of the court of appeals, judge of any district court of Kansas, district magistrate judge, or municipal court judge.

"Immediate family member" means a judge's spouse, child, parent, or any other blood relative who lives in the same residence as such judge.

"Personal information" means a judge's home address, home telephone number, pager number, personal e-mail address, personal photograph, photograph of the judge's home, and information about the judge's motor vehicle, any immediate family member's place of employment, any immediate family member's child or day care facility, and any immediate family member's public or private school that offers instruction in any or all of the grades kindergarten through 12.

Notes on Use

For authority, see K.S.A. 21-5905. The severity level for the offenses described in this instruction range from a class A nonperson misdemeanor to a severity level 7, nonperson felony, depending on the type of act charged. Reference should be made to the statute to determine the severity level of a particular act of interference with judicial process.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Torline*, 215 Kan. 539, 542, 543, 527 P.2d 994 (1974), the Court stated, "The phrase with intent improperly to influence a judicial officer as it appears in K.S.A. 1973 Supp. 21-3815, encompasses a broad range of possible conduct but is limited to conduct affecting a governmental function, the administration of justice by a judicial officer in relation to any matter which is or may be brought before him as a judicial officer."

In the above-cited case, the Court held that where an assault or threat is directed against a judicial officer some months after the final termination of proceedings before such officer, the one making the threat is not guilty of attempting to improperly influence a judicial officer.

59.060

**INTIMIDATION/AGGRAVATED INTIMIDATION OF A WITNESS
OR VICTIM**

The defendant is charged with [aggravated] intimidation of a (witness) (victim).

The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (prevented) (dissuaded) (attempted to prevent) (attempted to dissuade) a (witness) (victim) from attending or giving testimony at any (civil trial) (criminal trial) (proceeding or inquiry authorized by law).

OR

1. The defendant (prevented) (dissuaded) (attempted to prevent) (attempted to dissuade) a (witness) (victim) (person acting on behalf of a victim) from insert one of the following:

- making a report of the victimization of the victim to a (law enforcement officer) (prosecutor) (probation officer) (parole officer) (correctional officer) (community correctional officer) (judicial officer) (secretary of the department for children and families) (secretary for aging and disability services) (insert appropriate mandatory reporter under K.S.A. 38-2223).

or

- causing a (complaint) (indictment) (information) to be sought and prosecuted and assisting in its prosecution.

or

- causing a violation of (probation) (parole) (assignment to a community correctional services program) to be reported and prosecuted and assisting in its prosecution.

or

- causing a civil action to be filed and prosecuted and assisting in its prosecution.

or

- (arresting) (causing the arrest) (seeking the arrest) of any person in connection with the victimization of a victim.
2. This act was done with the intent to (vex, annoy, harm or injure another person) (thwart or interfere in any manner with the orderly administration of justice).
- [3. This act was insert one of the following:
- accompanied by an (expressed) (implied) threat of (violence) (force) against the (witness) (victim) (other person) or the property of the (witness) (victim) (other person).
or
 - in furtherance of a conspiracy.
or
 - committed by a person who has been previously convicted of insert crime.
or
 - committed against a (witness) (victim) who was under 18 years of age.
or
 - committed (for monetary gain) (for any consideration) by a person acting upon the request of another person.]
3. or 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5909. Intimidation of a witness or victim is a class B, person misdemeanor. Aggravated intimidation of a witness is a severity level 6, person felony.

See K.S.A. 21-5908 for definitions of "witness" and "victim."

Use bracketed Element No. 3 only when the defendant is charged with aggravated intimidation of a victim or witness. Note that the third option under Element No. 3 requires the trial judge to insert the name of a crime. Please see K.S.A. 21-5909 for a list of the crimes that can be inserted.

Conspiracy should be defined when the State alleges the act was committed in furtherance of a conspiracy. See PIK 4th 53.060, Conspiracy—Defined, for definition.

Whether a prior conviction of defendant was for a crime included within the provision of subsection (b)(3) of K.S.A. 21-5909 is a question of law for the court. When found to be included, insert the crime in the blank space.

Comment

In *State v. Wilkins*, 305 Kan. 3, 13-14, 378 P.3d 1082 (2016), the Supreme Court held that dissuading a codefendant from taking a plea offer does not equate to dissuading a witness from testifying, and thus cannot support a conviction for witness intimidation under K.S.A. 21-5909(a)(1).

Before July 1, 2011 Revisions to Criminal Code

It was held in *State v. Reed*, 213 Kan. 557, 559-562, 516 P.2d 913 (1973) that it is not necessary that an action or proceeding be pending at the time an attempt is made to deter a witness from giving evidence in order for a person to be guilty of corruptly influencing a witness under K.S.A. 21-3806 (repealed L. 1983). The expressed reasoning would appear applicable in prosecutions under K.S.A. 21-3832 and K.S.A. 21-3833.

In *State v. Phelps*, 266 Kan. 185, 967 P.2d 304 (1998), the court notes that the proper test to determine the reaction of an alleged victim in an intimidation or aggravated intimidation charge is objective, not subjective, i.e., that of a reasonable person. There are exceptions to this rule, such as where the perpetrator has knowledge of a particular vulnerability of the victim and then acts with full knowledge of the victim's vulnerability.

When the defendant is charged with an attempt to prevent a witness from testifying by threat of force or violence, the State need not prove that the victim or witness actually perceived the threat. Further, because an attempt to intimidate a witness is a specific and alternative means of committing aggravated intimidation of a witness, the State is not required to prove the elements of attempt under the general attempt statute, K.S.A. 21-3301. *State v. Quinones*, 42 Kan. App. 2d 48, 208 P.3d 335 (2009).

In *State v. Johnson*, 40 Kan. App. 2d 397, 192 P.3d 661 (2008), the Court of Appeals found that a Kansas district court had jurisdiction over a defendant who took her granddaughter from Colorado to an undisclosed location in New Mexico in order to prevent the child from appearing in Kansas to testify about alleged sexual abuse perpetrated upon her by her father. The court analyzed the jurisdictional question under K.S.A. 21-3104 and found that the proximate result of the defendant's act occurred in Reno County, when the child failed to appear to testify, and thus found jurisdiction was proper under K.S.A. 21-3104(c)(2).

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59.070

ESCAPE FROM CUSTODY

The defendant is charged with escape from custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant was being held in custody insert one of the following:
 - on (a charge of) (a conviction of) (an arrest for) a misdemeanor.
 - or
 - on (a charge) (an adjudication) (an arrest) as a juvenile offender when the act, if committed by an adult, would constitute a misdemeanor.
 - or
 - on commitment to the state security hospital by reason a finding of not guilty of a misdemeanor by reason of insanity, mental disease or mental defect.
2. The defendant (departed from custody without lawful authority) (failed to return to custody following temporary leave lawfully granted [by express authorization of law] [by order of a court] [by a custodial officer authorized to grant temporary leave]).
3. The defendant insert specific act committed by defendant intentionally, knowingly, or recklessly.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[A "charge" does not require that the defendant was held on a written charge contained in a complaint, information, or indictment, if the defendant was arrested prior to the defendant's escape from custody.]

Notes on Use

For authority, see K.S.A. 21-5911(a). For authority concerning the clarification of "charge," see K.S.A. 21-5911(e). Escape from custody is a class A, nonperson misdemeanor.

Element No. 3 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

The statute defining escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail. K.S.A. 21-5911(d)(1).

"Juvenile offender" is defined in K.S.A. 38-2302.

Comment

Before July 1, 2011 Revisions to Criminal Code

Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. *State v. Mixon*, 27 Kan. App. 2d 49, 998 P.2d 519 (2000).

"Lawful custody" contemplates an intent on the part of prison officials to exercise actual or constructive control over the prisoner in some way that restrains the prisoner's liberty. A prisoner who fails to abide by the conditions of house arrest may be found guilty of escape from custody. The key factor is whether or not prison officials have shown an intent to abandon or give up their prisoner, leaving him free to go on his way. *State v. Kraft*, 38 Kan. App. 2d 215, 219, 163 P.3d 361, *rev. denied* 285 Kan. 1176 (2007).

In *State v. Carreiro*, 203 Kan. 875, 878, 457 P.2d 123 (1969), the Court discusses and defines "escape" and states what constitutes "escape." The Court, in this case, also stated when a person is in "lawful custody."

In *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973), the Court held that in view of the specific statutory definition of the word "charge" in K.S.A. 22-2205(5), that escape statutes K.S.A. 21-3809 and 21-3810, are applicable only where a defendant escapes from lawful custody while being held on a written charge contained in a complaint, information, or indictment. This does not mean that the State is without a remedy where the defendant escapes custody prior to the filing of a formal written complaint. The Court also held that K.S.A. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where the defendant escapes from custody prior to the filing of a formal written complaint, information, or indictment.

Compulsion as a defense to escape from custody is available to a defendant who presents evidence that 1) the inmate faced a specific threat of imminent death or great bodily harm; 2) there was no time for a complaint to authorities or a history of futile complaints to authorities; 3) there was no time or opportunity to resort to the courts; 4) there is no evidence of force or violence toward prison personnel or other innocent persons in the escape; and 5) the inmate promptly reported to the proper authorities once he attained a position of safety from the imminent threat. *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992), *State v. Harvey*, 41 Kan. App. 2d 104, 202 P.3d 21 (2009). In the event that the defendant presents evidence on these elements, the jury should be given the compulsion instruction, PIK 3d 54.13.

59.080

AGGRAVATED ESCAPE FROM CUSTODY

The defendant is charged with aggravated escape from custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant was being held in custody insert one of the following:
 - on (a charge of) (a conviction of) (an arrest for) a felony.
or
 - on (a charge) (an adjudication) (an arrest) as a juvenile offender when the act, if committed by an adult, would constitute a felony.
or
 - prior to or on a finding of probable cause for evaluation as a sexually violent predator.
or
 - on commitment to a treatment facility as a sexually violent predator.
or
 - on commitment to the state security hospital on a finding of not guilty of a felony by reason of insanity, mental disease or defect.
or
 - after the age of 18 upon adjudication as a juvenile offender, when the act, if committed by an adult, would constitute a felony.
or
 - on incarceration at a state correctional institution while in the custody of the secretary of corrections.
2. The defendant (departed from custody without lawful authority) (failed to return to custody following temporary leave lawfully granted [by express authorization of law] [by order of a court] [by a custodial officer authorized to grant temporary leave]).

3. The defendant did so intentionally, knowingly, or recklessly.
4. This act occurred on or about the _____ day of _____,
_____ in _____ County, Kansas.

OR

1. The defendant effected or facilitated an escape by (the use of violence) (the threat of violence) against any person by the defendant while the defendant was held in custody insert one of the following:
 - on (a charge) (a conviction) of any crime.
or
 - on (a charge) (adjudication) as a juvenile offender where the act, if committed by an adult, would constitute a felony.
or
 - prior to or upon a finding of probable cause for evaluation as a sexually violent predator.
or
 - on commitment to a treatment facility as a sexually violent predator.
or
 - on commitment to the state security hospital on a finding of not guilty of a felony by reason of insanity, mental disease or defect.
or
 - after the age of 18 on (a charge) (adjudication) as a juvenile offender for either a misdemeanor or felony.
or
 - on incarceration at a state correctional institution while in the custody of the secretary of corrections.
2. The defendant did so intentionally, knowingly, or recklessly.
3. This act occurred on or about the _____ day of _____,
_____ in _____ County, Kansas.

A "charge" does not require that the defendant was held on a written charge contained in a complaint, information, or indictment, if the defendant was arrested prior to the defendant's escape from custody.

Notes on Use

For authority, see K.S.A. 21-5911(b). For authority concerning the clarification of "charge," see K.S.A. 21-5911(e). Aggravated escape from custody is either a severity level 8, 6 or 5, nonperson felony, depending on the offense charged. Reference should be made to the statute to determine the level of a particular offense.

Element No. 3 in the first alternative, and Element No. 2 in the second alternative, are required because the definitions of the crime do not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

The statute defining aggravated escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the court to determine and not a question of fact for the jury to decide. Custody does not include general supervision of a person on probation or parole or constraint incidental to release on bail. K.S.A. 21-5911(d)(1).

For definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

Comment

Before July 1, 2011 Revisions to Criminal Code

Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. *State v. Mixon*, 27 Kan. App. 2d 49, 998 P.2d 519 (2000).

"Lawful custody" contemplates an intent on the part of prison officials to exercise actual or constructive control over the prisoner in some way that restrains the prisoner's liberty. A prisoner who fails to abide by the conditions of house arrest may be found guilty of escape from custody. The key factor is whether or not prison officials have shown an intent to abandon or give up their prisoner, leaving him free to go on his way. *State v. Kraft*, 38 Kan. App. 2d 215, 219, 163 P.3d 361, *rev. denied*, 285 Kan. 1176 (2007).

The Kansas Court of Appeals approved PIK 3d 60.11 as a correct statement of the law in *State v. Mixon*, *supra*.

Compulsion as a defense to escape from custody is available to a defendant who presents evidence that 1) the inmate faced a specific threat of imminent death or great bodily harm; 2) there was no time for a complaint to authorities or a history of futile complaints to authorities; 3) there was no time or opportunity to resort to the courts; 4) there is no evidence of force or violence toward prison personnel or other innocent persons in the escape; and 5) the inmate promptly reported to the proper authorities once he attained a position of safety from the imminent threat.

State v. Irons, 250 Kan. 302, 827 P.2d 722 (1992), *State v. Harvey*, 41 Kan. App. 2d 104, 202 P.3d 21 (2009). In the event that the defendant presents evidence on these elements, the jury should be given the compulsion instruction, PIK 3d 54.13.

59.090

AIDING ESCAPE

The defendant is charged with [aggravated] aiding escape. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert escapee's name was in custody and the defendant insert one of the following:
 - assisted insert escapee's name to escape from custody.
 - or
 - supplied to insert escapee's name an object or thing adapted or designed for use in making an escape.
2. The defendant insert specific act committed by defendant intentionally, knowingly, or recklessly.

OR

1. Defendant introduced into the institution where insert escapee's name was confined an object or thing adapted or designed for use in making an escape.
2. The defendant insert specific act committed by defendant intentionally, knowingly, or recklessly.
- [3. Defendant was (an employee of the department of corrections) (a volunteer of the department of corrections) (the employee of a contractor that provides services to the department of corrections) (a volunteer of a contractor that provides services to the department of corrections) at the time the defendant aided the escape.]
3. or 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5912.

Element No. 2 in both alternatives is required because the definitions of the crime do not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Give optional Element No. 2 in the appropriate fact situation. Aiding escape is a level 8, nonperson felony. Conviction of aiding escape that includes optional Element No. 2 is a severity level 4, nonperson felony.

If custody is an issue, a definition of custody can be found in K.S.A. 21-5911(d)(1). For a definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.*

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

59.100

OBSTRUCTING APPREHENSION OR PROSECUTION

The defendant is charged with obstructing apprehension or prosecution.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knew that insert name of the person avoiding arrest or prosecution and then insert one of the following:
 - had committed a (felony) (misdemeanor).
 - or
 - was charged with committing a (felony) (misdemeanor).

OR

1. The defendant knew that insert name of the person avoiding registration was required to register as an offender and was not in compliance with the registration requirements and that insert name of the person avoiding registration was subject to prosecution for (his) (her) failure to register as an offender.
2. The defendant knowingly (harbored) (concealed) (aided) insert name of the person avoiding arrest, prosecution or registration.
3. The defendant did so with the intent that insert name of the person avoiding arrest, prosecution or registration would [(avoid) (escape from)] (registration) (arrest) (trial) (conviction) (punishment).
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5913. If the person harbored, concealed or aided has committed or is charged with a felony, it is a severity level 8, nonperson felony. If the person harbored, concealed or aided has committed or is charged with a misdemeanor, it is a class C misdemeanor. If the charges involve not registering under the offender registration act, it is a level 5, person felony.

For venue, see K.S.A. 22-2607 and 22-2616.

If the person allegedly aided had not been charged at the time aid was given, an issue may arise as to whether or not the person aided had in fact committed a crime. A separate instruction should be given setting forth the elements of the crime alleged to have been committed by the person aided.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Rider, Edens & Lemons*, 229 Kan. 394, 401, 625 P.2d 425 (1981), the Court held that three conditions were required to render one guilty as an accessory after the fact and the same conditions are required to render one guilty of aiding a felon under K.S.A. 21-3812(a): The felony must be complete, the accused must have knowledge that the principal committed the felony, and the accused must act with the intent to enable the principal to avoid or escape from arrest, trial, conviction or punishment for the felony. In the same case, the Court further stated, "Generally, any assistance or relief given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to render the person giving such assistance guilty for aiding a felon."

59.110

TRAFFIC IN CONTRABAND IN A CORRECTIONAL INSTITUTION

The defendant is charged with traffic in contraband in a correctional institution. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant insert one of the following:
 - (took) (sent) (attempted to take) (attempted to send) name of item from a (correctional institution) (care and treatment facility).
 - or
 - had the unauthorized possession of name of item while in a (correctional institution) (care and treatment facility).
 - or
 - supplied to a person in lawful custody an object or thing adapted or designed for use in making an escape.
 - or
 - introduced into an institution an object or thing adapted or designed for use in making an escape.

OR

1. The defendant (introduced) (attempted to introduce) name of item into or upon the grounds of a (correctional institution) (care and treatment facility).
2. The defendant was provided notice that name of item was forbidden within or upon the grounds of the (correctional institution) (care and treatment facility).
2. or 3. The defendant did so intentionally, knowingly, or recklessly.
3. or 4. The defendant acted without the consent of the administrator of the (correctional institution) (care and treatment facility).
- [4. or 5. The defendant was an (employee or volunteer of the department of corrections) (employee or volunteer of a contractor under contract to provide services to the department of corrections) at the time of the act.]

**5. or 6. This act occurred on or about the ____ day of _____, _____,
in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5914. Under this statute any item may be considered contraband. The particular item(s) should be designated in the instruction. Give the bracketed paragraph only when the defendant was an employee or volunteer of the department of corrections or the employee or volunteer of a contractor for the correctional institution or care and treatment facility.

The element designated "2. or 3." is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Traffic in firearms, ammunition, explosives or a controlled substance in a correctional institution or care and treatment facility is a severity 5, nonperson felony. K.S.A. 21-5914(b)(1).

Traffic in contraband by an employee or volunteer of a correctional institution is a severity level 5, nonperson felony, except that an employee or volunteer of the department of corrections or an employee or volunteer of a contractor of the department of corrections who introduces or supplies an object or thing adapted or designed for use in making an escape is guilty of a level 4, nonperson felony. K.S.A. 21-5914(b)(2). The fact that the defendant is an employee or volunteer of the department of corrections or a contractor for the department of corrections is the aggravating factor.

Traffic in contraband in a care and treatment facility by an employee or a care and treatment facility is a severity level 5, nonperson felony. K.S.A. 21-5914(b)(3).

Traffic in contraband, except for those special circumstances set out in K.S.A. 21-5914(b)(1)(2) or (3) is a severity level 6, nonperson felony.

K.S.A. 21-5914 does not itself require that a person have notice that an item is specifically forbidden within the facility. However, the Kansas appellate courts have found, at least with respect to introducing contraband into a facility, that the state must prove notice for a conviction to withstand constitutional challenge. *State v. Watson*, 273 Kan. 426, 429, 44 P.3d 357 (2002); *State v. Taylor*, 54 Kan. App. 2d 394, 428-431, 401 P.3d 632 (2017).

59.120

FAILURE TO APPEAR/AGGRAVATED FAILURE TO APPEAR

The defendant is charged with (failure to appear) (aggravated failure to appear). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant had been charged with a (misdemeanor) (felony) and released on an appearance bond to appear before a court.**
- 2. The defendant knowingly failed to appear before the court at the time ordered.**
- 3. The defendant's appearance bond was forfeited.**
- 4. The defendant (failed to surrender within 30 days following the forfeiture of appearance bond) (failed to surrender within 30 days after conviction of a [misdemeanor] [felony] had become final).**
- 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5915. Failure to appear for a misdemeanor charge is a class B, nonperson misdemeanor. Aggravated failure to appear, i.e., failure to appear for a felony, is a severity level 10, nonperson felony.

The provisions of K.S.A. 21-5915 do not apply to any person who forfeits a cash bond posted upon arrest for a traffic offense. K.S.A. 21-5915(d).

For venue, see K.S.A. 22-2615.

The 30-day period is a question of law.

Comment

Before July 1, 2011 Revisions to Criminal Code

In a prosecution for aggravated failure to appear under K.S.A. 21-3814, the State is not required to notify the defendant of the forfeiture of the appearance bond as provided in K.S.A. 22-2807 in order to establish the element of willfulness in K.S.A. 21-3814. To establish willfulness, it is sufficient if the State proves the defendant failed without just cause or excuse to surrender himself within 30 days following the forfeiture of his appearance bond. See *State v. Rodgers*, 225 Kan. 242, 245, 589 P.2d 981 (1979).

Failure to appear is "aggravated" only if the charge involved is a felony. When applicable, this element should be included in the trial court's instruction. See *State v. DeAtley*, 11 Kan. App. 2d 605, 731 P.2d 318 (1987).

59.130

FALSE IMPERSONATION

The defendant is charged with false impersonation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant represented (himself) (herself) to be a (public officer) (public employee) (insert name of profession or vocation), licensed to practice in the State of Kansas).**
- 2. The defendant did so with knowledge that the representation was false.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5917(a). False impersonation is a class B, nonperson misdemeanor.

The profession or vocation which the defendant falsely represented himself or herself to be a member of should be placed in the blank space, such as attorney, medical doctor, or certified public accountant.

"Public employee" and "public officer" are defined in K.S.A. 21-5111.

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59.140

AGGRAVATED FALSE IMPERSONATION

The defendant is charged with aggravated false impersonation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant falsely (impersonated) (represented [himself] [herself] to be) insert name.
2. The defendant did so intentionally, knowingly, or recklessly.
3. While falsely (impersonating) (representing [himself] [herself] to be) insert name, the defendant insert one of the following:
 - (became bail or security) (acknowledged a recognizance) (executed a bond or other instrument as bail or security) for a party in a civil or criminal proceeding before a court or officer authorized to take bail or security.
 - or
 - confessed a judgment.
 - or
 - acknowledged the execution of a conveyance of property or any other instrument which by law may be recorded.
 - or
 - did an act in the course of a (suit) (proceeding) (prosecution) which might make the individual (impersonated) (represented) liable for the payment of (a debt) (damages) (costs) (a sum of money) or which might affect the individual's rights or interests.
4. Insert name is a real person.
5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5917(b). Aggravated false impersonation is a severity level 9, nonperson felony.

Element No. 2 is required because the definition of the crime does not prescribe a required culpable mental state. See PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Element No. 4 is required under *State v. Banks*, 14 Kan. App. 2d 33, 790 P.2d 962 (1990).

59.150

DEALING IN FALSE IDENTIFICATION DOCUMENTS

The defendant is charged with dealing in false identification documents. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly (reproduced) (manufactured) (sold) (offered for sale) a insert name of document which (simulated) (purported to be) (was designed to cause others reasonably to believe it to be) an identification document.**
- 2. The insert name of document bore a fictitious name or other false information.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

The term "identification document" as used in this instruction means any card, certificate, document or banking instrument including a credit or debit card that identifies or purports to identify the bearer of such document, whether or not it was intended for use as identification. The term also includes documents purporting to be drivers' licenses, nondrivers' identification cards, certified copies of birth, death, marriage and divorce certificates, social security cards and employee identification cards.

Notes on Use

For authority, see K.S.A. 21-5918(a). Dealing in false identification documents is a severity level 8, nonperson felony. The instructing court should be aware of the inapplicability of the dealing in false identification section of the statute to certain circumstances that are described in subsections (d)(1) and (2).

The document which the defendant is charged with manufacturing, selling or offering for sale should be described with particularity in the blank spaces.

For unlawful use of fictitious or fraudulently altered driver's license, see K.S.A. 8-260.

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59.160**VITAL RECORDS IDENTITY FRAUD RELATED TO BIRTH,
DEATH, MARRIAGE, AND DIVORCE CERTIFICATES**

The defendant is charged with vital records identity fraud related to a (birth) (death) (marriage) (divorce) certificate. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant supplied false information with the intent that the information be used to obtain a certified copy of a vital record.**

OR

- 1. The defendant (made) (counterfeited) (altered) (amended) (mutilated) a certified copy of a vital record without lawful authority and with the intent to deceive.**

OR

- 1. The defendant (obtained) (possessed) (used) (sold) (furnished to another) (attempted to obtain) (attempted to possess) (attempted to furnish to another) a certified copy of a vital record with the intent to deceive.**

- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5918(b). Vital records identity fraud is a severity level 8, nonperson felony.

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59.170

**INTERFERENCE/AGGRAVATED INTERFERENCE WITH THE
CONDUCT OF PUBLIC BUSINESS IN A PUBLIC BUILDING**

The defendant is charged with [aggravated] interference with the conduct of public business in a public building. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant engaged in conduct at or in a public building so as to knowingly deny to any (public official) (public employee) (invitee on such premises) the right to enter, use or leave the public building.

OR

1. The defendant knowingly impeded any (public official) (public employee) in the lawful performance of duties or activities through the use of (restraint) (abduction) (coercion) (intimidation) (force and violence) (the threat of force or violence).

OR

1. The defendant knowingly refused or failed to leave a public building when requested to do so by (the chief administrative officer) (one charged with maintaining order in the public building) at a time when the defendant was (committing) (threatening to commit) (inciting others to commit) an act which did or would (disrupt) (impair) (interfere with) (obstruct) the lawful functions being carried on in the public building.

OR

1. The defendant knowingly (impeded) (disrupted) (hindered) the normal proceedings of any meeting conducted by any (judicial body) (legislative body) (official at any public building) by insert one of the following:
 - intrusion into the chamber or other areas designated for the use of the (body) (official) conducting the meeting.

or

- an act designed to (intimidate) (coerce) (hinder) any (member of body) (official) engaged in the performance of duties at the meeting or session.

OR

1. The defendant knowingly (impeded) (disrupted) (hindered) the normal proceedings of an executive (body) (official) by intrusion into the chamber or other area designed for the use of the (body) (official).
 - [2. The defendant did so when in possession of (a firearm) (insert name of weapon), a weapon).]
2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5922.

The aggravating factor set forth in optional Element No. 2 should only be given when the defendant is charged with aggravated interference with the conduct of public business in a public building.

Interference with the conduct of public business in a public building is a class A, nonperson misdemeanor. K.S.A. 21-5922(c)(1).

Aggravated interference with the conduct of public business in a public building is a level 6, nonperson felony. K.S.A. 21-5922(c)(2).

"Weapons" are restricted to those described in K.S.A. 21-6301 and 6302.

59.180

**UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION
OF COMMUNICATIONS**

The defendant is charged with unlawful disclosure of authorized interception of (wire) (oral) (electronic) communications. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant communicated to a person or made public in any way the existence of an application or order for the interception of (wire) (oral) (electronic) communications.**
- 2. The act was done with the intent to obstruct, impede or prevent an authorized interception.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

"Intercept" means the hearing or otherwise learning of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.

Notes on Use

For authority, see K.S.A. 21-5923. Unlawful disclosure of an authorized interception of communications is a severity level 10, nonperson felony.

Definitions of wire communication, oral communication and electronic communication are found in K.S.A. 22-2514.

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59.190

VIOLATION OF A PROTECTIVE ORDER

The defendant is charged with violation of a protective order. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly violated insert one of the following:
 - a protection from abuse order issued under Kansas law.
or
 - a protective order issued by a court or tribunal of (any state) (any Indian tribe).
or
 - a restraining order issued under Kansas law.
or
 - an order issued in this or any other state as a condition of (pretrial release) (diversion) (probation) (suspended sentence) (postrelease supervision) that the defendant have no direct or indirect contact with another person.
or
 - an order issued in this or any other state (as a condition of release after conviction) (as a condition of a supersedeas bond pending disposition of an appeal) that the defendant have no direct or indirect contact with another person.
or
 - a protection from stalking, sexual assault, or human trafficking order issued under Kansas law.
2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5924. Violation of a protective order is a class A, person misdemeanor.

Violation of an extended protective order under subsection (e)(2) of K.S.A. 60-3107, and subsection (d) of K.S.A. 60-31a06, is a severity level 6, person felony.

Whether a protective order is consistent with 18 U.S.C. 2265 is a question of law for the court.

Comment

Before July 1, 2011 Revisions to Criminal Code

Consent of the plaintiff in a protection from abuse case for the defendant to have contact with the plaintiff is not a defense to a criminal prosecution for violation of a protective order. *State v. Branson*, 38 Kan. App. 2d 484, 167 P.3d 370 (2007), *rev. denied*, 286 Kan. 1180 (2008).

59.200

MEDICAID FRAUD

The defendant is charged with medicaid fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant with the intent to defraud (made) (presented) (submitted) (offered) (caused to be made) (caused to be presented) (caused to be submitted) (caused to be offered):**
 - (a) a (false) (fraudulent) claim for payment for any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in whole or in part, under the medicaid program, whether or not the claim was allowed or allowable.**
or
 - (b) a (false) (fraudulent) statement or representation for use in determining payments which might be made, in whole or in part, under the medicaid program, whether or not the claim was allowed or allowable.**
or
 - (c) a (false) (fraudulent) report or filing which was or might be used in computing or determining a rate of payment for any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in whole or in part, under the medicaid program, whether or not the claim was allowed or allowable.**
or
 - (d) a (false) (fraudulent) statement or representation made in connection with any (report) (filing) which was or might be used in (computing) (determining) a rate of payment for any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in whole or in part, under the medicaid program, whether or not the claim was allowed or allowable.**
or
 - (e) a (statement) (representation) for use by another in obtaining any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in**

whole or in part, under the medicaid program, knowing the (statement) (representation) to be false, in whole or in part, by commission or omission, whether or not the claim was allowed or allowable.

or

- (f) a claim for payment for any (goods) (service) (item) (facility) (accommodation) which was not medically necessary in accordance with professionally recognized parameters or as otherwise required by law, for which payment might be made, in whole or in part, under the medicaid program, whether or not the claim was allowed or allowable.

or

- (g) a (false) (fraudulent), either in whole or in part, (book) (record) (document) (data) (instrument) which was (required to be kept) (kept) as documentation for any (goods) (service) (item) (facility) (accommodation) for which payment (was) (had been) (could be) sought, in whole or in part, under the medicaid program, whether or not the claim was allowed or allowable.

or

- (h) a (false) (fraudulent), either in whole or in part, (book) (record) (document) (data) (instrument) to (any properly identified law enforcement officer) (any properly identified or authorized representative of the attorney general) (any properly identified employee or agent of the Kansas department for aging and disability services, the Kansas department of health and environment, or their fiscal agents) in connection with any (audit) (investigation) involving any (claim for payment) (rate of payment) for any (goods) (service) (item) (facility) (accommodation) payable, in whole or in part, under the medicaid program.

or

- (i) any (false) (fraudulent) statement or representation made, with the intent to influence any (act) (decision) of any (official) (employee) (agent) of a state or federal agency having regulatory or administrative authority over the Kansas medicaid program.

OR

- 1. The defendant intentionally (executed) (attempted to execute) a scheme or artifice to defraud the medicaid program or any contractor or subcontractor of the medicaid program.**

- [2. The total amount of payments illegally claimed is (\$25,000 or more) (at least \$1,000 but less than \$25,000) (less than \$1,000).]**

OR

- [2. Great bodily harm resulted from such act.]**

OR

- [2. Death resulted from such act.]**

- 2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5927.

Include optional Element No. 2 when the crime charged is described in one of the options set out in Element Nos. 1(a) through (g) or alternative Element No. 1.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Reference should be made to the statute to determine the severity level for the particular offense charged.

Previously, the Notes on Use recommended use of special questions on the verdict form when the amount obtained was disputed. In *State v. Brown*, 298 Kan. 1040, 1046, 318 P.3d 1005 (2014), the Supreme Court noted that "the use of special questions [has been] prohibited in criminal trials" since its decision in *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973). Accordingly, if the amount obtained is disputed the court may find it appropriate to give lesser included offense instructions and verdict forms corresponding with the disputed amounts obtained.

59.210

UNLAWFUL ACTS RELATED TO THE MEDICAID PROGRAM

The defendant is charged with an unlawful act related to the medicaid program. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally (solicited) (received) a (kickback) (bribe) (rebate), either directly or indirectly, overtly or covertly, (in cash) (in kind) insert one of the following:**

- in return for (referring) (refraining from referring) an individual to another person for (furnishing) (arranging to furnish) any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in whole or in part, under the medicaid program.**

or

- in return for (purchasing) (leasing) (ordering) (arranging for purchasing) (arranging for leasing) (arranging for ordering) (recommending for purchasing) (recommending for ordering) (recommending for leasing) any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in whole or in part, under the medicaid program.**

OR

- 1. The defendant intentionally (offered) (paid) a (kickback) (bribe) (rebate) directly or indirectly, overtly or covertly, (in cash) (in kind) to another person to induce that person to insert one of the following:**

- (refer) (refrain from referring) an individual to another person for (furnishing) (arranging to furnish) any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in whole or in part, under the medicaid program.**

or

- (purchase) (lease) (order) (arrange for purchasing) (arrange for leasing) (arrange for ordering) (recommend for purchasing) (recommend for leasing) (recommend for ordering) any (goods) (service) (item) (facility) (accommodation) for which payment might be made, in whole or in part, under the medicaid program.

OR

1. The defendant intentionally (divided) (shared) funds illegally obtained from the medicaid program.

OR

1. The defendant, a medicaid recipient, intentionally (traded a medicaid number for money) (signed for services that were not received) (sold for value goods purchased or provided under the medicaid program) (exchanged for value goods purchased or provided under the medicaid program).
2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-5928. Violation of this statute is a severity level 7, nonperson felony.

59.220

AIRCRAFT REGISTRATION

The defendant is charged with failure to register an aircraft. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant possessed an aircraft.**
- 2. The defendant knew the aircraft was not registered in accordance with the regulations of the Federal Aviation Administration with the Secretary of Transportation.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5935. Failure to register an aircraft is a severity level 8, nonperson felony.

Registration of aircraft must be in accord with regulations of the Federal Aviation Administration. Those regulations are presently in Title 14, Chapter 1, parts 47-49 of the Code of Federal Regulations and an instruction defining eligibility for registration should be given.

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59.230**FRAUDULENT REGISTRATION OF AIRCRAFT**

The defendant is charged with fraudulent aircraft registration. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (possessed) (operated) an aircraft in Kansas.**
- 2. The defendant knew the aircraft was registered to a (nonexistent [person] [firm] [business] [corporation]) ([firm] [business] [corporation] that is no longer a legal entity).**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5936(a)(1). Fraudulent registration of an aircraft is a severity level 8, nonperson felony. See PIK 4th 59.240 for fraudulent registration by providing false information.

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59.240

FRAUDULENT AIRCRAFT REGISTRATION—SUPPLYING FALSE INFORMATION

The defendant is charged with supplying false information regarding ownership of an aircraft. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly supplied false information to a government entity regarding the (name) (address) (business name) (business address) of the owner of an aircraft (in) (operated in) Kansas.**

OR

- 1. The defendant knowingly supplied false information to a government entity regarding ownership by (the defendant) (a firm) (a business) (a corporation) (another) of an aircraft (in) (operating in) Kansas.**
- 2. The (firm) (business) (corporation) insert one of the following:**

- is not, or has never been, a legal entity in any state.**

or

- has lapsed into a state of no longer being a legal entity in Kansas and no documented attempt has been made to correct such information with the government entity for a period of 90 days after the date on which the lapse took effect with the Kansas Secretary of State.**

- 2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5936(a)(2) and (3). Supplying false information regarding an aircraft is a severity level 8, nonperson felony. See PIK 4th 59.230 for fraudulent registration.

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59.250

AIRCRAFT IDENTIFICATION—FRAUDULENT ACTS

The defendant is charged with fraudulent acts relating to aircraft identification numbers. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly insert one of the following:**
 - **(bought) (received) (disposed of) (distributed) (concealed) (operated) (possessed) (attempted to [buy] [receive] [dispose of] [distribute] [conceal] [operate] [possess]) an aircraft or part thereof on which the assigned identification numbers do not meet the requirements of the federal aviation regulations.**
 - or**
 - **(possessed) (manufactured) (distributed) a counterfeit manufacturer's aircraft identification number plate or decal used for the identification of an aircraft.**
 - or**
 - **(authorized) (directed) (aided) the (exchange) (giving away) of a counterfeit manufacturer's aircraft identification number plate or decal used for identification of an aircraft.**
- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-5937. Fraudulent acts regarding aircraft identification numbers is a severity level 8, nonperson felony. See Title 14, Chapter 1, parts 47.15 and 47.16 of the Code of Federal Regulations for requirements of the Federal Aviation Administration as to assigned identification numbers. The trial judge will need to draft an appropriate instruction as to the relevant requirements based upon the evidence.

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59.260

VOTING WITHOUT BEING QUALIFIED

The defendant is charged with voting without being qualified. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Defendant knowingly (voted) (attempted to vote) insert one of the following:
 - in an election district when the defendant was not a lawfully registered voter in such election district.
 - or
 - at an election when the defendant (was not a citizen of the United States) (did not meet the qualifications of an elector).
 - or
 - at an election when the defendant did not meet a qualification to be an elector, namely insert unmet qualification(s).
2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 25-2416. Voting without being qualified is a severity level 7, nonperson felony.

K.S.A. 21-5301(c) does not apply to a violation of attempting to vote without being qualified.

59.270

VOTING MORE THAN ONCE

The defendant is charged with voting more than once. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally [(voted) (attempted to vote)] [(more than once in the same jurisdiction) (in more than one jurisdiction in the United States)] in an election held on insert date.**

OR

- 1. The defendant intentionally (induced) (aided) another person to vote (more than once in the same jurisdiction) (in more than one jurisdiction in the United States) in an election held on insert date.**

OR

- 1. The defendant knowingly (marked) (transmitted to the county election officer) more than one (advance voting ballot) (set of one of each kind of advance voting ballots, if the person voting is entitled to vote more than one such ballot) in an election held on insert date.**

- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 25-2434 and 25-1128. Voting more than once or attempting to commit the crime of voting more than once is a severity level 7, nonperson felony. Voting more than once by advance ballot is covered in K.S.A. 25-1128(a). Voting more than once by advance ballot is a severity level 9, nonperson felony.

The provisions of K.S.A. 21-5301(c) do apply to a violation of attempting to commit the crime of voting more than once.

59.280

FALSE IMPERSONATION OF A VOTER

The defendant is charged with false impersonation of a voter. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. Defendant represented (himself) (herself) as another person, whether real or fictitious, in (voting) (attempting to vote).**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 25-2431. False Impersonation of a Voter is a severity level 8, nonperson felony.

59.290**UNLAWFUL ADVANCE VOTING**

The defendant is charged with unlawful advance voting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly (marked) (signed) (transmitted to the county election officer) an advance voting (ballot) (ballot envelope) for another person.**
- 2. The defendant did so without legal authority.**

OR

- 1. The defendant knowingly signed an application for an advance voting ballot for another person.**
- 2. The defendant in signing the application did so without legal authority to sign an advance voting ballot for the other person.**

OR

- 1. The defendant assisted a voter who (had an illness) (had a physical disability) (was not proficient in reading the English language) in (applying for) (marking) an advance voting ballot.**
- 2. The defendant knowingly (failed to sign and submit insert a description of the form required by K.S.A. 25-1124(e)) (exercised undue influence on the voting decision of the person the defendant was assisting with advance voting).**

OR

- 1. The defendant assisted a voter who had a disability preventing the voter from signing an (application) (advance voting ballot).**

2. The defendant knowingly (failed to sign and submit insert a description of the form required by K.S.A. 25-1124(e)) (exercised undue influence on the voting decision of the person the defendant was assisting with advance voting).

OR

1. The defendant knowingly and falsely (affirmed) (declared) (subscribed to) a material fact in an affirmation form for (an advance voting ballot) (a set of advance voting ballots).
2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[A person has legal authority to assist a voter who has an illness or physical disability or who is not proficient in reading the English language to (apply for) (mark) (transmit) an (application for an advance voting ballot) (advance voting ballot) so long as a written statement signed by the person who renders assistance to the voter is submitted to the county election officer with the (application) (ballot).]

[A person has legal authority to assist a voter who has a disability preventing the voter from signing an application or the form on the ballot envelope so long as a written statement signed by the person who renders assistance to the voter is submitted to the county election officer with the (application) (ballot).]

[A person has legal authority to assist a voter by transmitting a voted ballot to the county election officer so long as the voter has designated the person to do so in writing.]

Notes on Use

For authority, see K.S.A. 25-1128 and 25-1124(f). An advance voting violation is a severity level 9, nonperson felony.

K.S.A. 25-1124(c)-(e) describe circumstances in which a person may lawfully assist another with advance voting. The applicable bracketed paragraph should be used when the state is required to prove that the defendant acted "without legal authority."

59.300**INTERFERING WITH ADVANCE VOTING**

The defendant is charged with interfering with advance voting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly (interfered with) (delayed the transmission of) an advance voting ballot application from a voter to the county election officer.**

OR

- 1. The defendant knowingly (intercepted) (interfered with) (delayed the transmission of) advance voting ballots from the county election officer to the voter.**

OR

- 1. The defendant knowingly (mailed) (faxed) (caused to be sent) an advance voting ballot application to a place other than the county election office.**

OR

- 1. The defendant was (a person) (part of a group) engaged in the distribution of advance voting ballot applications.**
- 2. The defendant failed to (mail) (fax) (deliver) any application signed by a voter to the county election office within two days after the application was signed by the applicant.**

- 2. or 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 25-1128. Interfering with advance voting is a severity level 9, nonperson felony.

59.310**ELECTION BRIBERY**

The defendant is charged with election bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (conferred) (offered) (agreed to confer) (solicited) (accepted) (agreed to accept) a benefit as consideration (to) (from) any person to (vote or withhold any person's vote) (vote for or against any candidate) (vote for or against any question submitted) at any public election.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

[It is not election bribery for a business or organization to provide a product of value less than \$3 to a person who asserts that the person has voted, without regard to the person's vote for or against any candidate or issue.]

Notes on Use

For authority, see K.S.A. 25-2409. Election bribery is a severity level 7, nonperson felony.

The bracketed paragraph should be given when applicable to the facts.

59.320

ELECTION TAMPERING

The defendant is charged with election tampering. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. Defendant (made) (changed) an election record.**
- 2. Defendant was not charged with an election duty.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 25-2423. Election tampering is a severity level 7, nonperson felony.

59.330**UNLAWFUL AUTOMATED SALES SUPPRESSION**

The defendant is charged with unlawful automated sales suppression. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly (sold) (purchased) (installed) (transferred) (manufactured) (created) (designed) (updated) (repaired) (used) (possessed) an (automated sales suppression device) (zapper) (phantom-ware).**
- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction, "automated sales suppression device" or "zapper" means a computer software program, carried on a memory stick or removable compact disc, accessed through an internet link or accessed through any other means that falsifies the electronic records of electronic cash registers and other point-of-sale systems, including, but not limited to, transaction data and transaction reports.

As used in this definition, "electronic cash register" means a device that keeps a register or supporting documents through the means of an electronic device or computer system designed to record transaction data in any manner.

As used in this definition, "phantom-ware" means a hidden, pre-installed or installed at a later time programming option embedded in the operating system of an electronic cash register or hardwired into the electronic cash register that can be used to create a virtual second till or may eliminate or manipulate transaction records that may or may not be preserved in digital formats to represent the true or manipulated record of transactions in the electronic cash register.

As used in this definition, "transaction data" includes, but is not limited to:

- items purchased by a customer;**
- the price for each item;**
- a taxability determination for each item;**
- a segregated tax amount for each of the taxed items;**

- the amount of cash or credit tendered;
- the net amount returned to the customer in change;
- the date and time of the purchase;
- the name, address, and identification number of the vendor;
and
- the receipt or invoice number of the transaction.

As used in this definition, "transaction report" means a report including, but not limited to, the sales, taxes collected, media totals and discount voids at an electronic cash register that is printed on cash register tape at the end of a day or shift, or a report documenting every action at an electronic cash register that is stored electronically.

Notes on Use

For authority, see K.S.A. 21-5939. A violation of this statute is a severity level 7, nonperson felony.

60.010

BRIBERY

The defendant is charged with bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant directly or indirectly (offered) (gave) (promised to give) a (benefit) (reward) (consideration) to insert the name of the person, who was a public official.
2. Insert name of the public official was not permitted by law to accept the (benefit) (reward) (consideration).
3. The (benefit) (reward) (consideration) was (offered) (given) (promised) in exchange for insert one of the following:
 - the (performance) (omission of performance) of the public official's powers or duties.
 - a promise to (perform) (omit performance of) the public official's powers or duties.
4. The defendant acted with the intent to improperly influence insert name of the public official.

OR

1. The defendant was a public official.
2. The defendant intentionally (requested) (received) (agreed to receive), directly or indirectly, a (benefit) (reward) (consideration).
3. The defendant was not permitted by law to accept the (benefit) (reward) (consideration).
4. The defendant (requested) (received) (agreed to receive) the (benefit) (reward) (consideration) with the intent that (he) (she) would be improperly influenced, and insert one of the following:
 - the (benefit) (reward) (consideration) was, or was intended to be, in exchange for the (performance) (omission of performance) of the defendant's powers or duties as a public official.

- the (benefit) (reward) (consideration) was, or was intended to be, in exchange for a promise to (perform) (omit performance of) the defendant's powers or duties as a public official.

5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

A "public official" is a person who is a public officer, candidate for public office, or public employee.

Notes on Use

For authority, see K.S.A. 21-6001. Bribery is a severity level 7, nonperson felony.

The first part of the instruction is applicable when the crime charged is that of offering or giving a bribe to a public official, as defined in K.S.A. 21-6001(c). The second part of the instruction is applicable when the crime charged is soliciting a bribe. A public official convicted of bribery forfeits his or her office or employment and, notwithstanding expungement, is forever disqualified from holding public office or employment. For sports bribery, see PIK 4th 65.040, Sports Bribery. Where the breach of official duty has already occurred, see PIK 4th 60.030, Compensation for Past Official Acts.

Comment

Before July 1, 2011 Revisions to Criminal Code

The bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's authority to make a binding decision. *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978). The bribery statutes were held not to be unconstitutionally vague and indefinite in *State v. Campbell*, 217 Kan. 756, 780, 539 P.2d 329 (1975).

60.020

OFFICIAL MISCONDUCT

Defendant is charged with official misconduct. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was a public (officer) (employee).**
- 2. The defendant insert one of the following:**
 - knowingly used or authorized the use of (an aircraft) (a vehicle) (a vessel) under (his) (her) control or direction, or in (his) (her) custody, exclusively for the private benefit or gain of (the officer) (the employee) (another).**
or
 - knowingly failed to serve civil process when required by law.**
or
 - used confidential information acquired in the course of and related to the (officer's office) (employee's employment) for the private (benefit) (gain) of the (officer) (employee) (another).**
or
 - used confidential information acquired in the course of and related to the (officer's office) (employee's employment) with the intent to cause harm to another.**
or
 - disclosed confidential information regarding proposals or communications from (bidders) (prospective bidders) on any [proposed] contract with the intent to (reduce) (eliminate) competition among (bidders) (prospective bidders).**
or

- **accepted a (bid) (proposal) on a [proposed] contract after the deadline for acceptance of the (bid) (proposal) with the intent to (reduce) (eliminate) competition among (bidders) (prospective bidders).**
or
- **altered a (bid) (proposal) on a [proposed] contract submitted by a bidder with the intent to (reduce) (eliminate) competition among (bidders) (prospective bidders).**
or
- **knowingly (destroyed) (tampered with) (concealed) evidence of a crime.**
or
- **knowingly submitted to a governmental entity a claim for expenses which is false or duplicates expenses for which a claim has already been submitted to (the governmental entity) (another governmental entity) (a private entity).**

3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6002. The severity levels for the offenses described in this instruction range from a class A, nonperson misdemeanor to a severity level 7, nonperson felony. K.S.A. 21-6002(b). Reference should be made to the statute to determine the severity level for the particular offense charged.

If the offense charged is described by the last option of paragraph 2 and there is a disputed issue regarding the amount of the claimed expenses, the court may find it appropriate to give lesser included offense instructions and verdict forms to correspond with the different severity levels of the offense that are applicable.

K.S.A. 21-6002(d) defines "confidential" for these purposes as "any information that is not subject to mandatory disclosure pursuant to K.S.A. 45-221."

For a definition of "aircraft," see K.S.A. 3-201.

For a definition of "vehicle," see K.S.A. 8-1485.

For a definition of "vessel," see K.S.A. 32-1103.

For a definition of "knowingly," see K.S.A. 21-5202.

60.030

COMPENSATION FOR PAST OFFICIAL ACTS

The defendant is charged with compensation for past official acts. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was a public (officer) (employee).
2. Insert name gave a (decision) (opinion) (recommendation) (vote) favorable to defendant.

OR

2. Insert name performed an act of official misconduct, as follows: insert act alleged to constitute official misconduct.
3. The defendant intentionally (gave) (offered to give) to insert name any benefit, reward or consideration intending it to be compensation for the act.
4. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6003. Compensation for past official acts is a class B, nonperson misdemeanor. See PIK 4th 60.040, Compensation for Past Official Acts—Defense.

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60.040

COMPENSATION FOR PAST OFFICIAL ACTS—DEFENSE

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were conferred on account of kinship or other personal, professional or business relationships independent of the official status of the receiver.

OR

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were trivial benefits incidental to personal, professional, or business contacts and involved no substantial risk of undermining official impartiality.

Notes on Use

For authority, see K.S.A. 21-6003. If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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60.050

PRESENTING A FALSE CLAIM

The defendant is charged with presenting a false claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. Insert name was a (public officer) (public body) authorized to allow or pay a claim.**
- 2. The defendant presented to insert name a claim which was false in whole or in part.**
- 3. The defendant did so with intent to defraud.**
- 4. The amount of the false claim presented was (less than \$1,000) (more than \$1,000 but less than \$25,000) (more than \$25,000).**
- 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6004(a). Presenting a false claim for \$25,000 or more is a severity level 7, nonperson felony. Presenting a false claim for at least \$1,000 but less than \$25,000 is a severity level 9, nonperson felony. Presenting a false claim for less than \$1,000 is a class A, nonperson misdemeanor.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim and PIK 4th 58.480, Value In Issue, should be given. The verdict form to be used is PIK 4th 68.120, Verdict Form—Value In Issue.

Where a claim is presented, part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Wilson*, 11 Kan. App. 2d 504, 728 P.2d 1332 (1986), defendant was convicted of presenting a false claim by a state employee in violation of K.S.A. 75-3202 and presenting a false claim in violation of K.S.A. 21-3904 based upon the same transaction. The conviction under K.S.A. 21-3904 was reversed on the ground that K.S.A. 75-3202 is a specific statute controlling over K.S.A. 21-3904, a general statute.

60.060

PERMITTING A FALSE CLAIM

The defendant is charged with permitting a false claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was a public (officer) (employee).**
- 2. The defendant (approved by audit) (allowed or paid) a claim made upon insert governmental entity or agency.**
- 3. The defendant knew such claim was false or fraudulent in whole or in part.**
- 4. The amount of the false claim presented was (less than \$1,000) (more than \$1,000 but less than \$25,000) (\$25,000 or more).**
- 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6004(b). Permitting a false claim for \$25,000 or more is a severity level 7, nonperson felony. Permitting a false claim for at least \$1,000 but less than \$25,000 is a severity level 9, nonperson felony. Permitting a false claim for less than \$1,000 is a class A, nonperson misdemeanor. Upon conviction of permitting a false claim, defendant forfeits his or her public office or employment.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim, and PIK 4th 58.480, Value in Issue, should be given. The verdict form to be used is PIK 4th 68.120, Verdict Form—Value in Issue.

In Element No. 2, designate the state, subdivision, or governmental instrumentality against whom the claim is made.

Where a claim is permitted part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

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60.070

MISUSE OF PUBLIC FUNDS

The defendant is charged with misuse of public funds. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was a (custodian) (person having control) of public money by virtue of (his) (her) official position.**
- 2. The defendant (used) (lent) (permitted another to use) public money in a manner (he) (she) knew was not authorized by law.**
- 3. The total amount of public money defendant (used) (lent) (permitted another to use) was (less than \$1,000) (less than \$25,000 but greater than \$1,000) (less than \$100,000 but greater than \$25,000) (greater than \$100,000).**
- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

"Public money" means money or a negotiable instrument which belongs to the state of Kansas or any public subdivision thereof.

Notes on Use

For authority, see K.S.A. 21-6005. The severity level of this offense is based on the aggregate amount of public funds misused: greater than \$100,000 is a severity level 5, nonperson felony; less than \$100,000 but greater than \$25,000 is a severity level 7, nonperson felony; less than \$25,000 but greater than \$1,000 is a severity level 9, nonperson felony; and less than \$1,000 is a class A misdemeanor.

In addition, upon conviction of misuse of public funds, the convicted person shall forfeit the person's official position.

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60.080

UNLAWFUL USE OF STATE POSTAGE

The defendant is charged with unlawful use of State postage. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant used United States postage for (his) (her) personal benefit.**

OR

- 1. The defendant permitted insert name to use United States postage for the personal benefit of insert name.**
- 2. The defendant knew the postage was paid for with funds of the State of Kansas.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6006. Unlawful use of State postage is a class C misdemeanor.

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61.010**BREACH OF PRIVACY—INTERCEPTING MESSAGE**

The defendant is charged with breach of privacy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly and without lawful authority intercepted a message by (telephone) (telegraph) (letter) (other means of private communication).**
- 2. The defendant did so without the consent of either the sender or receiver.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6101(a)(1). Intercepting a message is a class A, nonperson misdemeanor.

This offense does not apply to telephone party lines or telephone extensions.

Comment

Before July 1, 2011 Revisions to Criminal Code

Privacy of communication protected hereunder not violated by electronic recording where consent of sender alone obtained; admissible evidence. *State v. Wigley*, 210 Kan. 472, 474, 476, 502 P.2d 819 (1972).

No violation hereunder by telephone company monitoring its property to protect its interests therein; search warrant based on evidence therefrom legal. *State v. Hruska*, 219 Kan. 233, 238, 240, 241, 547 P.2d 732 (1976).

Disclosure of the information intercepted is not an element of the offense under paragraph (a)(1) of K.S.A. 21-4002. The interception itself completes the offense. *MGM, Inc. v. Liberty Mut. Ins. Co.*, 253 Kan. 198, 203, 855 P.2d 77 (1993).

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61.020

BREACH OF PRIVACY—DIVULGING MESSAGE

The defendant is charged with breach of privacy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly and without lawful authority divulged the existence or contents of a message sent by (telephone) (telegraph) (letter) (other means of private communication).**
- 2. The defendant did so without the consent of either the sender or receiver.**
- 3. The defendant (knew the message had been illegally intercepted) (illegally learned of the message in the course of the defendant's employment with the transmitting agency).**
- 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6101(a)(2). Divulging a message is a class A, nonperson misdemeanor.

The Committee is unaware of what the Legislature intended by use of the terms "illegally intercepted" or "illegally learned" as contained in K.S.A. 21-6101(a)(2). The instruction should be modified to specifically identify the claimed illegality.

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61.030

BREACH OF PRIVACY—EAVESDROPPING

The defendant is charged with breach of privacy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly and without lawful authority entered into a private place.
2. The defendant did so with intent to insert one of the following:
 - listen surreptitiously to private conversation in that private place.
 - or
 - observe the personal conduct of a person or persons entitled to privacy in the private place.

OR

1. The defendant knowingly and without lawful authority (installed) (used), outside or inside a private place, a device for hearing, recording, amplifying or broadcasting sounds originating in that place which sounds would not ordinarily be audible or comprehensible outside without the use of the device.
2. This was done without the consent of insert name, who was entitled to privacy therein.

OR

1. The defendant knowingly and without lawful authority (installed) (used) a device for the interception of a (telephone) (telegraph) (wire) (wireless) communication.
2. This was done without the consent of insert name, the person in possession or control of the facilities for such communication.

OR

1. The defendant:

- knowingly and without lawful authority (installed) (used) a concealed (camcorder) (motion picture camera) (photographic camera of any type) to secretly (videotape) (film) (photograph) (record) an identifiable person [insert name if known], by electronic or other means (under or through the clothing worn by insert name if known) (when insert name if known was nude or in a state of undress);
- for the purpose of viewing the (body) (undergarments) of insert name if known;
- without consent or knowledge of insert name if known;
- with the intent to invade the privacy of insert name if known; and
- under circumstances in which insert name if known had a reasonable expectation of privacy.

2. or 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

["Private place" means a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but does not include a place to which the public has lawful access.]

Notes on Use

For authority, see K.S.A. 21-6101(a)(3), (4), (5), and (6). A violation of any of the first three alternatives is a class A, nonperson misdemeanor. A violation of the fourth alternative is a level 8, person felony for the first conviction and a level 5, person felony for a subsequent conviction within five years.

In the last alternative Element No. 1, insert a name as shown in the brackets if the charging document included the name of the person depicted in the video or photograph. Replace the remaining blank lines in Element No. 1 with the words "the identifiable person" if the charging document did not include the depicted person's name.

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2)

the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require a modification of the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

For extensive comment, see *Kansas Judicial Council Bulletin*, April 1968, p. 94.

Installation or use of an electronic device to record communications transmitted by telephone with consent of the person in possession or control of the facilities for such communication is not unlawful, and a recorded telephone conversation under these circumstances is admissible in evidence. *State v. Wigley*, 210 Kan. 472, 502 P.2d 819 (1972).

Possession and control are discussed and defined. *State v. Bowman National Security Agency, Inc.*, 231 Kan. 631, 647 P.2d 1288 (1982).

A telephone company, having reasonable grounds to suspect its billing procedures are being bypassed by electronic device, may monitor any telephone from which it reasonably believes illegal calls are being placed. *State v. Hruska*, 219 Kan. 233, 547 P.2d 732 (1976).

In *State v. Martin*, 232 Kan. 778, 658 P.2d 1024 (1983), on appeal from a trial court judgment of acquittal on the ground that the statute did not clearly proscribe defendant's actions, it was held that defendant's acts in inviting women to his attic studio to be photographed while modeling clothes and photographing them through a one-way mirror while they were changing clothes violated (1)(a) of the statute. Entry and observe are defined.

In *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984), defendant sought to suppress evidence obtained by a search warrant based on information received through use of a transmitting device concealed on the person of a police informant who entered defendant's home. It was held the use of the concealed transmitter did not violate K.S.A. 21-4001(1)(a) and (b) or 21-4002(1)(a) and (b). Any party to a private conversation may waive the right of privacy and a non-consenting party has no Fourth Amendment or statutory right to challenge that waiver. Interception of a private message requires the consent of either sender or receiver, not both.

State v. Liebau, 31 Kan. App. 2d 501, 508, 67 P.3d 156 (2003), held that a parent has authority to enter a child's bathroom or other place of privacy, whether physically or electronically, if the parent has a good faith basis that is objectively reasonable to believe it is in the child's best interests. As such, when a parent seeks to use parental rights as a defense, the parent's right to enter a place of privacy, physically or electronically, depends on the purpose of the entry.

61.040

DENIAL OF CIVIL RIGHTS

The defendant is charged with denial of civil rights. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant intentionally denied to insert name on account of the (race) (color) (ancestry) (national origin) (religion) of insert name the full and equal insert one of the following:

- use and enjoyment of the services, facilities, privileges and advantages of any institution, department or agency of (the state) (any political subdivision of the state) (any municipality).

or

- use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of (any establishment which provides lodging to transient guests for hire) (any establishment which is engaged in selling food or beverages to the public for consumption upon the premises) (any place of recreation, amusement, exhibition or entertainment which is open to the public).

or

- use and enjoyment of services, privileges and advantages of any facilities for the public transportation of persons or goods.

or

- use and enjoyment of the services, facilities, privileges and advantages of any establishment which offers personal or professional services to members of the public.

or

- exercise of the right to vote in any election held pursuant to Kansas law.

2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6102. Denial of civil rights is a class A, nonperson misdemeanor.

Comment

Before July 1, 2011 Revisions to Criminal Code

For comment, see *Kansas Judicial Council Bulletin*, April 1968, p. 97. See annotation, Participation of Student in Demonstration on or near Campus as Warranting Expulsion or Suspension from School or College, 32 A.L.R. 864.

It was held in *State v. Barclay*, 238 Kan. 148, 708 P.2d 972 (1985) that the portion of the statute quoted in paragraph 1(d) of the instruction was not applicable under the facts to an ordained minister operating a wedding chapel who refused on grounds of his religious beliefs to perform a marriage ceremony for a black person and a white person.

61.050

IDENTITY THEFT

The defendant is charged with identity theft. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

1. The defendant (obtained) (possessed) (transferred) (used) (sold) (purchased) any personal identifying information or document containing personal identifying information belonging to or issued to insert name of other person.
2. The defendant did so with the intent to defraud insert name of person defendant intended to defraud in order to receive a benefit.

OR

2. The defendant did so with the intent to misrepresent insert name of person listed in Element No. 1 in order to subject (him) (her) to economic or bodily harm.
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Personal identifying information" includes the following: name; birth date; address; telephone number; drivers license number or card or non-drivers identification number or card; social security number or card; place of employment; employee identification numbers or other personal identification numbers or cards; mother's maiden name; birth, death or marriage certificates; electronic identification numbers; electronic signatures; and any financial number or password that can be used to access a person's financial resources, including checking or savings accounts, credit or debit card information, demand deposit, or medical information. Personal identifying information also includes passwords, usernames, or other log-in information that can be used to access a person's personal electronic content, including content stored on a social networking website.

"Personal electronic content" means the electronically stored content of an individual, including pictures, videos, emails, and other data files.

"Social networking website" means a privacy-protected internet website which allows individuals to construct a public or semi-public profile

within a bounded system created by the service, create a list of other users with whom the individual shares a connection within the system, and view and navigate the list of users with whom the individual shares a connection and those lists of users made by others within the system.

Notes on Use

For authority, see K.S.A. 21-6107. Identity theft is a severity level 8, nonperson felony if the monetary loss is less than \$100,000. It is a severity level 5, nonperson felony if the monetary loss to the victim or victims is more than \$100,000.

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require a modification of the instruction.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *City of Liberal v. Vargas*, 28 Kan. App. 2d 867, 24 P.3d 155, *rev. denied* 271 Kan. 1035 (2001), *Vargas*, an illegal alien, had purchased false identity papers to obtain employment. Misrepresentation of his true identity to the employer gave rise to identity theft charges. The Court of Appeals affirmed the district court's acquittal of *Vargas*, noting that a review of the legislative history of K.S.A. 21-4018 revealed no legislative intent to protect a third party (here, the employer) from identity theft.

Additionally, the *Vargas* court noted that the assumption of a false identity is not identity theft unless a real person's identity has, in the process, been "stolen." Since *Vargas*, this issue has been addressed by the legislature in the establishment of the crime of identity fraud. K.S.A. 21-4018(d) [now K.S.A. 21-6107(b)]. See PIK 4th 61.060, Identity Fraud.

State v. Hardesty, 42 Kan. App. 2d 431, 213 P.3d 745 (2009), found that the identity of a deceased person is included in the statutory language of "another person" set forth in K.S.A. 21-4018.

In *State v. Green*, 38 Kan. App. 2d 781, 172 P.3d 1213 (2007), the court rejected a claim of double jeopardy and multiplicitous charging when the defendant was convicted of three counts of identity theft stemming from the use of the same stolen identification on three separate occasions during a two-day period. The court stated, "[e]ach time an innocent person's identity is intentionally used for some fraudulent purpose it is a crime. Each use of another person's identity is a unit of prosecution for the crime of identity theft."

61.060

IDENTITY FRAUD

The defendant is charged with identity fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant used or supplied information the defendant knew to be false in order to obtain a document containing any personal identifying information.

OR

1. The defendant (made) (counterfeited) (altered) (amended) (manufactured) (replicated) any document containing personal identifying information with the intent to deceive.

2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Personal identifying information" includes the following: name; birth date; address; telephone number; drivers license number or card or non-drivers identification number or card; social security number or card; place of employment; employee identification numbers or other personal identification numbers or cards; mother's maiden name; birth, death or marriage certificates; electronic identification numbers; electronic signatures; and any financial number or password that can be used to access a person's financial resources, including checking or savings accounts, credit or debit card information, demand deposit, or medical information. Personal identifying information also includes passwords, usernames, or other log-in information that can be used to access a person's personal electronic content, including content stored on a social networking website.

"Personal electronic content" means the electronically stored content of an individual, including pictures, videos, emails, and other data files.

"Social networking website" means a privacy-protected internet website which allows individuals to construct a public or semi-public profile within a bounded system created by the service, create a list of other users with whom the individual shares a connection within the system, and view and navigate the list of users with whom the individual shares a connection and those lists of users made by others within the system.

Notes on Use

For authority, see K.S.A. 21-6107. Identity fraud is a severity level 8, nonperson felony.

When the charged offense is committed with an electronic device, a prosecution may be brought in the county in which: (1) any requisite act to the commission of the crime occurred; (2) the victim resides; (3) the victim was present at the time of the crime; (4) property affected by the crime was obtained or was attempted to be obtained; or as otherwise provided by law. See K.S.A. 22-2619(b). This may require a modification of the instruction.

61.070

OBTAINING CONSUMER INFORMATION

The defendant is charged with obtaining information on a consumer under false pretenses. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly and willfully obtained information on a consumer from a consumer reporting agency.**
- 2. The defendant did so under false pretenses.**
- 3. The act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction:

The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a corporate nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

The term "consumer" means an individual.

The term "false pretenses" means that the defendant obtained information by means of an intentionally false statement or misrepresentation; that the false statement or misrepresentation deceived the consumer reporting agency; and that the consumer reporting agency relied, in whole or in part, upon the false statement or misrepresentation in relinquishing control of the information to the defendant.

Notes on Use

For authority, see K.S.A. 50-718. Obtaining information on a consumer under false pretenses is a severity level 7, person felony. Definitions can be found in K.S.A. 50-702.

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61.080

**UNLAWFULLY PROVIDING INFORMATION ON
AN INDIVIDUAL CONSUMER**

The defendant is charged with unlawfully providing information on an individual consumer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant is an officer or employee of a consumer reporting agency.**
- 2. The defendant knowingly and willfully provided information concerning insert name from the agency files to insert name, a person not authorized to receive that information.**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction:

The term "consumer reporting agency" means any person which, for monetary fees, dues or on a corporate nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

The term "consumer" means an individual.

Notes on Use

For authority, see K.S.A. 50-719. Unlawfully providing consumer information is a severity level 7, person felony. Definitions can be found in K.S.A. 50-702.

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62.010**RIOT**

The defendant is charged with riot. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant used force or violence which resulted in a breach of the public peace.**
- 2. The defendant acted in a group of five or more persons.**
- 3. The defendant acted without authority of law.**

OR

- 1. The defendant threatened to use force or violence to produce a breach of the public peace against any person or property.**
- 2. The threat was accompanied by power or apparent power of immediate execution.**
- 3. The defendant acted in a group of five or more persons.**
- 4. The defendant acted without authority of law.**

- 4. or 5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6201. Riot is a class A person misdemeanor. For definition of breach of the public peace, see Appendix 1—Definitions and Explanations of Terms.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

Before July 1, 2011 Revisions to Criminal Code

The distinction between riot and incitement to riot was noted in *State v. Dargatz*, 228 Kan. 322, 326-327, 614 P.2d 430 (1980), where the Court approved the substance of PIK 2d 63.04, Riot and 63.05, Incitement to Riot.

Although some shared intent would be intrinsic in the element of acting in a group comprising the riot, the statute does not require the State to prove an agreement among the group members to riot. See *State v. Stewart*, 281 Kan. 594, 598-599, 133 P.3d 11 (2006), wherein the court also approved the substance of PIK 3d 63.04.

62.020

INCITEMENT TO RIOT

The defendant is charged with incitement to riot. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant by words or conduct knowingly urged others to engage in a riot under circumstances which produced a clear and present danger of injury to persons or property or a breach of the public peace.**
- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

"Riot" is any use of force or violence which produces a breach of the public peace, or any threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution, by five or more persons acting together and without authority of law.

Notes on Use

For authority, see K.S.A. 21-6201(b). Incitement to riot is a severity level 8, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

Incitement to riot is a specific intent crime. *State v. Dargatz*, 228 Kan. 322, 331, 614 P.2d 430 (1980). Hence, in a proper case, an instruction on voluntary intoxication may be appropriate.

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62.030

DISORDERLY CONDUCT

The defendant is charged with disorderly conduct. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant *insert one of the following:*
 - engaged in brawling or fighting.
 - or
 - disturbed (an assembly) (a meeting) (a procession) not unlawful in its character.
 - or
 - engaged in noisy conduct of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others.
 - or
 - used fighting words directed at *insert name of person or group*.
2. The defendant knew or should have known that [(his) (her)] (conduct) (language) would alarm, anger, or disturb others or provoke an assault or other breach of the peace.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

["Fighting words" are words that by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace.]

Notes on Use

For authority, see K.S.A. 21-6203. Disorderly conduct is a class C misdemeanor. This offense covers conduct formerly called disturbing the peace. The last paragraph, a definitional paragraph for "fighting words," should be used when the defendant's speech is alleged to be the disorderly conduct.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Phelps*, 28 Kan. App. 2d 690, 20 P.3d 731 (2001), the Court stated that a necessary element of "fighting words" is that the words be directed to a specific person or group. The court further stated that the phrase "breach of the peace" is commonly understood and is not in need of further definition by the trial court.

"Disorderly conduct is an offense which may be committed in either a public or private place." *State v. Beck*, 9 Kan. App. 2d 459, Syl. ¶ 1, 682 P.2d 137 (1984). No special standard applies when the language is directed at a police officer; instead the jury must consider the totality of the circumstances to determine what is disorderly conduct. 9 Kan. App. 2d at 462-63.

Disorderly conduct will not usually be a lesser included offense of criminal threat or battery. *State v. Butler*, 25 Kan. App. 2d 35, 956 P.2d 733 (1998).

62.040

**CRIMINAL DESECRATION—MONUMENTS/CEMETERIES/
PLACES OF WORSHIP**

The defendant is charged with criminal desecration. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant, by means other than by fire or explosive, recklessly (damaged) (defaced) (destroyed) a (public monument or structure) [(tomb) (monument) (memorial) (marker) (grave) (vault) (crypt gate) (tree) (shrub) (plant) (insert other property) in a cemetery] (insert place of worship), a place of worship).**
- 2. The property was damaged to the extent of (less than \$1,000) (at least \$1,000 but less than \$25,000) (\$25,000 or more).**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6205. Desecrating public monuments, property in a cemetery, and places of worship is a class A nonperson misdemeanor if damage is less than \$1,000; if at least \$1,000 but less than \$25,000 it is a severity level 9, nonperson felony; and if \$25,000 or more, a severity level 7, nonperson felony. Where the extent of damage is in issue, PIK 4th 68.120, Verdict Form—Value in Issue, and PIK 4th 58.480, Value in Issue, should be used and modified accordingly.

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62.050

HARASSMENT BY TELECOMMUNICATION DEVICE

The defendant is charged with harassment by telecommunication device. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (used a [telephone] [cellular telephone] [telefacsimile machine] [insert other device meeting requirements of K.S.A. 22-2514]) (knowingly permitted a [telephone] [cellular telephone] [telefacsimile machine] [insert other device meeting requirements of K.S.A. 22-2514] under the defendant's control to be used) to insert one of the following:
 - knowingly (make) (transmit) any (comment) (request) (suggestion) (proposal) (image) (text) which is (obscene) (lewd) (lascivious) (indecent).
or
 - (make) (transmit) a call with intent to (abuse) (threaten) (harass) any person at the receiving end, whether or not conversation ensues.
or
 - (make) (transmit) a (comment) (request) (suggestions) (proposal) (image) (text) with intent to (abuse) (threaten) (harass) any person at the receiving end.
or
 - (make) (cause) a (telephone) (cellular telephone) (telefacsimile machine) (insert other device meeting requirements of K.S.A. 22-2514) to repeatedly (ring) (activate) with intent to harass any person at the receiving end.
or
 - knowingly play any recording on a telephone—except recordings such as weather information or sports information—when the number of the telephone is dialed, unless the person or group playing the recording and is identified and states that it is a recording.

OR

- 1. The defendant used a telefacsimile communication to (send) (transmit) the communication to a court in the state of Kansas for a use other than court business. The State need not prove that the defendant did so intentionally, knowingly, or recklessly.**
- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6206(a)(1). Harassment by telecommunication device is a class A nonperson misdemeanor. For criminal threat, see PIK 4th 54.370. The last alternative, sending a fax communication to a Kansas court for other than court business, is one of the few crimes for which the State is not required to prove the culpable mental state of the defendant.

Comment

Before July 1, 2011 Revisions to Criminal Code

Identification of the voice of defendant over the telephone was mentioned in *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

In *State v. Thompson*, 237 Kan. 562, 701 P.2d 694 (1985), intent to harass was determined to be an element of the crime of harassment by telephone under K.S.A. 21-4113(1)(a).

The Kansas Supreme Court in *State v. Schuette*, 273 Kan. 593, 44 P.3d 459 (2002), discussed at length the evidentiary foundation necessary to admit caller ID information and also determined that the caller ID device display was not hearsay. The Court further found that the defendant's convictions of both telephone harassment and criminal threat were not multiplicitous.

62.060

MAKING AN UNLAWFUL REQUEST FOR EMERGENCY SERVICE ASSISTANCE

The defendant is charged with making an unlawful request for emergency service assistance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant transmitted or communicated, in any manner, (false) (misleading) information to request (law enforcement) (fire) (medical) (*insert other*) emergency service assistance.
2. The defendant did so knowing that there was no reasonable ground to believe emergency service assistance was needed.
- [3. The defendant used an electronic device or software to alter, conceal, or disguise the (source of the request) (identity of the person making the request).

OR

3. The defendant's request for emergency service assistance included false information that (violent criminal activity) (an immediate threat to a person's life or safety) (an immediate threat to public safety) had taken place or was taking place.

OR

3. (Bodily harm to *insert name*) (Great bodily harm to *insert name*) (*Insert name's* death) resulted from the response by emergency services.]
3. or 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6207. Depending on the facts, making an unlawful request for emergency service assistance ranges in severity from a class A, nonperson misdemeanor to a level 1, person felony. Use the alternative Element No. 3 that corresponds to the level of crime charged.

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63.010

CRIMINAL USE OF WEAPONS

The defendant is charged with criminal use of weapons. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly insert one of the following:
 - (sold) (manufactured) (purchased) (possessed) a (bludgeon) (sand club) (metal knuckles).
or
 - possessed with the intent to use the same unlawfully against another a (dagger) (dirk) (stiletto) (straight-edged razor) (dangerous knife) (billy) (blackjack) (slungshot) (throwing star) (insert dangerous or deadly weapon or instrument of like character).
 - or
 - set a spring gun.
or
 - possessed a device or attachment of any kind (designed) (used) (intended for use) in suppressing the report of any firearm.
or
 - (sold) (manufactured) (purchased) (possessed) a (shotgun with a barrel less than 18 inches in length) (firearm designed or capable of discharging automatically more than once by a single function of the trigger), whether or not the defendant knew or had reason to know (the length of the barrel) (that the firearm was designed or capable of discharging automatically).
or

- **(possessed) (manufactured) (caused to be manufactured) (sold) (offered for sale) (lent) (purchased) (gave away) any cartridge which can be fired by a handgun and which has a plastic-coated bullet with a core of less than 60% lead by weight, whether or not the defendant knew or had reason to know that the plastic coated bullet had a core of less than 60% lead by weight.**
or
- **(sold) (gave or otherwise transferred) a firearm to a person who was both addicted to and an unlawful user of a controlled substance.**
or
- **(sold) (gave or otherwise transferred) a firearm to a person who was (at the time, or was previously, a mentally ill person subject to involuntary commitment for care or treatment) (a person with an alcohol or substance abuse problem subject to involuntary commitment for care and treatment).**
or
- **possessed a firearm, and the defendant was a person who was at the time both addicted to and an unlawful user of a controlled substance.**
or
- **possessed a firearm, and the defendant was at the time or was at some previous time (a mentally ill person subject to involuntary commitment for care and treatment) (a person with an alcohol or substance abuse problem subject to involuntary commitment for care and treatment).**
or
- **possessed a firearm while a fugitive from justice.**
or
- **possessed a firearm when defendant was an alien illegally or unlawfully in the United States.**

OR

1. The defendant was not a law enforcement officer, and (he) (she) knowingly possessed a firearm (on school property or grounds upon which was located a building or structure used by a unified school district or accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or grades 1-12) (at any regularly scheduled school sponsored activity or event), whether the defendant knew or had reason to know that (he) (she) was in or on such property or grounds.

OR

1. The defendant was not a law enforcement officer, and (he) (she) knowingly refused to surrender or immediately remove (from school property or grounds) (at any regularly scheduled school sponsored activity or event) any firearm in (his) (her) possession when so requested or directed by an authorized (school employee) (law enforcement officer).

OR

1. The defendant knowingly (sold) (gave or otherwise transferred) a firearm with a barrel less than 12 inches long to insert name, whether or not the defendant knew or had reason to know the length of the barrel.
2. Insert name was less than 18 years old at the time.

OR

1. The defendant knowingly possessed a firearm with a barrel less than 12 inches in length.
2. The defendant was less than 18 years old at the time.

OR

1. The defendant knowingly possessed a firearm while subject to a court order.
2. The court order was issued after a hearing for which the defendant received actual notice and had an opportunity to participate.
3. Insert name of person protected by court order was (the defendant's intimate partner) (the defendant's child) (the child of the defendant's intimate partner).

4. The court order restrained the defendant from insert one of the following:

- harassing, stalking, or threatening insert name of person protected by court order.

or

- engaging in conduct that would place the defendant's intimate partner in reasonable fear of bodily injury to the (intimate partner) (child).

5. The court order insert one of the following:

- included a finding that the defendant represented a credible threat to the physical safety of the (intimate partner) (child).

or

- explicitly prohibited the (use) (attempted use) (threatened use) of physical force against the (intimate partner) (child) that would reasonably be expected to cause bodily injury.

OR

1. The defendant knowingly possessed a firearm within five years of a (misdemeanor conviction for a domestic violence offense) (misdemeanor conviction under the law of another jurisdiction that is substantially similar to the same Kansas misdemeanor offense).

2. or 3. or 6. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6301(a)(1)-(18). Violation of K.S.A. 21-6301(a)(10) or (11) is a class B, nonperson misdemeanor. Violation of K.S.A. 21-6301(a)(1)-(3), (7)-(9) or (12) is a class A, nonperson misdemeanor. Violation of K.S.A. 21-6301(a)(4)-(6) is a severity level 9, nonperson felony. Violation of K.S.A. 21-6301(a)(13) or (15)-(18) is a severity level 8, nonperson felony. Violation of K.S.A. 21-6301(a)(14) is a class A, nonperson misdemeanor, except that it is a severity level 8, nonperson felony for a second or subsequent conviction. See PIK 4th

63.090, Weapons Crimes—Defenses, and K.S.A. 21-6301(c)-(l) for any applicable statutory exemptions.

"Throwing star" is defined at K.S.A. 21-6301(m)(4).

"Switchblade" was deleted from the list of prohibited knives as of July 1, 2013.

"Fugitive from justice" is defined at K.S.A. 21-6301(m)(2).

"Domestic violence" is defined at K.S.A. 21-6301(m)(1).

"Intimate partner" is defined at K.S.A. 21-6301(m)(3).

The "Protection from Abuse Act" is at K.S.A. 60-3101 *et. seq.*

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Kulper*, 12 Kan. App. 2d 301, 744 P.2d 519 (1987), the Court held evidence that the defendant possessed all the pieces of a disassembled shotgun is sufficient to support a conviction. PIK 2d 64.01 is cited with approval.

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

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63.020

CRIMINAL CARRYING OF A WEAPON

The defendant is charged with criminal carrying of a weapon. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly insert one of the following:
 - carried a (bludgeon) (sandclub) (metal knuckles) (throwing star).
 - or
 - carried, concealed on defendant's person, a (billy) (blackjack) (slungshot) (insert dangerous or deadly weapon or instrument of like character).
 - or
 - carried (on defendant's person) (in a [land] [water] [air] vehicle) a (tear gas bomb) (smoke bomb) (projector or object containing a noxious [liquid] [gas] [substance]), with the intent to use the same unlawfully.
 - or
 - carried, concealed on defendant's person when the defendant was less than 21 years old, a (pistol) (revolver) (firearm) at a time when the defendant was not on the defendant's own (land) (abode) (fixed place of business).
 - or
 - carried (a shotgun with a barrel less than 18 inches in length) (a firearm designed to discharge or capable of discharging automatically more than once by a single function of the trigger), whether the defendant knew or had reason to know (the length of the barrel) (that the firearm was designed or capable of discharging automatically).
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6302(a)(1)-(5). Violation of subsections (1)-(4) is a class A, nonperson misdemeanor. Violation of subsection (5) is a severity level 9, nonperson felony. See PIK 4th 63.090, Weapons Crimes—Defenses.

"Throwing star" is defined at K.S.A. 21-6301(1).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975), it was held that a municipal ordinance which prohibited the use of certain weapons was not in conflict with the state statute (21-4201), even though the municipal ordinance was more restrictive.

Under K.S.A. 21-4201(a)(2), the intentional carrying of a concealed weapon upon the person of the accused constitutes in itself a complete criminal offense, irrespective of the purpose or motive of the accused, unless the accused occupies an exempt status expressly recognized in the statute. *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976). However, the statutory exemptions, K.S.A. 21-6302(c)-(f), were abolished in 2015. In *Lassley*, the Court also held that where the defendant is charged with carrying a concealed weapon, under 21-4201(a)(2), a separate instruction defining general criminal intent is not necessary if an instruction on the elements of the crime requires the State to prove that the proscribed act was done willfully or knowingly.

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), held that the crime of carrying a concealed weapon under 21-4201(a)(4) is not a lesser included offense of unlawful possession of a firearm under 21-4204(a)(2). PIK 64.02 is cited.

In *State v. Hargis*, 5 Kan. App. 2d 608, 609, 611, 620 P.2d 1181 (1980), the Court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of the individual's commission as a special deputy or school security guard.

In *City of Junction City v. Mevis*, 226 Kan. 526, 530, 601 P.2d 1145 (1979), the Court held that a city ordinance prohibiting anyone from carrying firearms within the city limits was unconstitutionally broad.

State v. Hunt, 8 Kan. App. 2d 162, 164, 651 P.2d 967 (1982), held that a scalpel is a dangerous weapon within the meaning of K.S.A. 21-4201(a)(2).

In *State v. Doile*, 7 Kan. App. 2d 722, 648 P.2d 262 (1982), the constitutionality of subsection (a)(4) was upheld as not an unreasonable exercise of police power or overbroad.

The constitutionality of K.S.A. 21-4201(a)(1) was upheld in *State v. Neighbors*, 21 Kan. App. 2d 824, 908 P.2d 649 (1995), wherein the court found the statute to be neither vague nor overbroad.

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

63.030

CRIMINAL DISTRIBUTION OF A FIREARM TO A FELON

The defendant is charged with criminal distribution of a firearm to a felon. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly (sold) (gave) (transferred) a firearm to insert name.
2. The defendant knew that insert name had, within the preceding five years, (been convicted of insert name of the applicable crime, a felony under the laws of Kansas or other jurisdiction) (been released from imprisonment for a felony), and during which prior felony insert name was not in possession of a firearm.

OR

2. The defendant knew that insert name had, within the preceding 10 years, (been convicted of insert name of the applicable crime, a felony, and during the commission of which prior felony insert name was not found to be in possession of a firearm at the time of the commission of the felony) (been released from imprisonment for insert name of applicable felony, and has not had such conviction expunged or been pardoned for such conviction).

OR

2. The defendant knew that insert name had been convicted of a felony under the laws of Kansas or other jurisdiction, and during which prior felony insert name was found to have been in possession of a firearm.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6303(a)(1)-(3). Violation of this statute is a class A, nonperson misdemeanor. Subsection (c) of the statute lists the felonies that apply or do not apply under subsections (a)(1) or (a)(2). Subsection (d) states it is not a defense that the distributor did not know or have reason to know the precise felony the recipient committed, that the recipient was in possession of a firearm during the prior felony, or that the conviction for the prior felony has not been expunged or pardoned.

Comment

Before July 1, 2011 Revisions to Criminal Code

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

63.040

**CRIMINAL POSSESSION OF A WEAPON BY A
CONVICTED FELON**

The defendant is charged with criminal possession of a weapon by a convicted felon. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant possessed a weapon.
2. The defendant has been (convicted of insert person felony or other appropriate offense from subsection (a)(1) of K.S.A. 21-6304) (convicted in another jurisdiction of insert crime from other jurisdiction which is substantially the same as a person felony or other appropriate offense from subsection (a)(1) of K.S.A. 21-6304) (adjudicated a juvenile offender for committing insert act which if done by an adult would constitute a person felony or other appropriate offense from subsection (a)(1) of K.S.A. 21-6304).
3. The defendant was found to be in possession of a firearm at the time of the prior (crime) (juvenile offense).

OR

2. The defendant within five years preceding such possession has been (convicted of insert appropriate offense from subsection (a)(2) of K.S.A. 21-6304) (convicted in another jurisdiction of insert crime from another jurisdiction which is substantially the same as a felony described in subsection (a)(2) of K.S.A. 21-6304) (released from imprisonment for insert appropriate offense from subsection (a)(2) of K.S.A. 21-6304) (adjudicated a juvenile offender for committing insert act which if done by an adult would constitute the commission of a felony).
3. The defendant was not found to be in possession of a firearm at the time of the prior (crime) (juvenile offense).

OR

2. The defendant within 10 years preceding such possession has been (convicted of insert appropriate offense from subsection (a)(3)(A) of K.S.A. 21-6304) (convicted of an attempt, conspiracy, or criminal solicitation of insert appropriate offense from subsection (a)(3)(A) of K.S.A. 21-6304) (convicted in another jurisdiction of insert offense from another jurisdiction which is substantially the same as a felony described in subsection (a)(3)(A) of K.S.A. 21-6304) (released from imprisonment for insert appropriate offense from subsection (a)(3)(A) of K.S.A. 21-6304) (adjudicated a juvenile offender for committing insert act which if done by an adult would constitute the commission of a felony described in subsection (a)(3)(A) of K.S.A. 21-6304).
3. The defendant was not found to be in possession of a firearm at the time of the prior (crime) (juvenile offense), and has not had the prior (conviction) (adjudication) expunged or been pardoned for such (crime) (juvenile offense).

OR

2. The defendant within 10 years preceding such possession has been (convicted of insert Kansas nonperson felony) (convicted in another jurisdiction of insert crime from another jurisdiction which is substantially the same as a nonperson felony in Kansas) (released from prison for insert nonperson felony) (adjudicated a juvenile offender for committing insert act which if done by an adult would constitute a nonperson felony).
3. The defendant was found to be in possession of a firearm at the time of the prior (crime) (juvenile offense).
4. This act occurred on or about the _____ day of _____, _____ in _____, County, Kansas.

"Possession" means having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

"Weapon" means a firearm or knife.

"Knife" means a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character.

Notes on Use

For authority, see K.S.A. 21-6304(a)(1)-(3). Violation of this statute is a severity level 8, nonperson felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

If a defendant stipulates to a prior crime necessary for conviction under K.S.A. 21-4204, the court should reveal to the jury neither the number nor nature of the prior convictions. The court should only instruct the jury that it may consider the convicted felony status element of the crime as proven by agreement of the parties in the form of a stipulation. *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999).

In *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994), the Supreme Court sustained the trial court and negated any requirement of the state to prove the statutory negative in alternative C above that the defendant had not been pardoned or had the prior conviction expunged. Likewise, the Kansas Court of Appeals in *State v. Johnson*, 25 Kan. App. 2d 105, 959 P.2d 476, *rev. denied* 265 Kan. 888 (1998), noted that when a defendant is charged under K.S.A. 21-4204(a)(3), alternative B above, the state has no obligation to present proof that the defendant was found not to have been in possession of a firearm at the time of the commission of the prior felony.

In *State v. Pollard*, 273 Kan. 706, 44 P.3d 1261 (2002), the court held that Kansas law will apply in determining whether or not a defendant's out-of-state criminal proceeding constitutes a conviction as a predicate to prosecution for the Kansas crime of felony criminal possession of a firearm under K.S.A. 21-4204. In *Pollard*, the defendant had plead guilty to a prior act of felony first-degree burglary in Missouri, was found guilty by the Missouri trial court, and was given a "suspended imposition of sentence" with two years of probation. The terms of his probation included prohibitions against the possession or control of firearms. Under Missouri law, however, a "suspended imposition of sentence" is not a conviction as Missouri does not consider such to be a final judgment. The *Pollard* court held that, despite the peculiarities of Missouri law, the question is whether or not the Missouri matter constituted the equivalent of a conviction in Kansas. The *Pollard* court concluded, after examining (1) the legal definition of

conviction under statute and case law; (2) the procedural posture of Pollard's predicate felony; and (3) the construction of the term "conviction" for criminal history scoring purposes, that the Missouri court had actually established the defendant's factual guilt, and the Missouri matter was the equivalent of a conviction in Kansas which could be used as a predicate conviction for K.S.A. 21-4204.

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

The State is required to accept a defendant's stipulation that he or she was previously convicted of a felony and was therefore legally prevented from possessing a firearm on the date in question. However, the district court must allow the State to place the actual judgment and sentence of the defendant's prior conviction or adjudication into the record, outside the presence of the jury. *State v. Mitchell*, 285 Kan. 1070, Syl. ¶¶ 3, 4, 179 P.3d 394 (2008).

63.050

**AGGRAVATED WEAPONS VIOLATION BY
A CONVICTED FELON**

The defendant is charged with aggravated weapons violation by a convicted felon. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly insert one of the following:
 - (sold) (manufactured) (purchased) (possessed) a (bludgeon) (sand club) (metal knuckles) (throwing star).
or
 - possessed with the intent to use the same unlawfully against another a (billy) (blackjack) (slungshot) (insert dangerous or deadly weapon or instrument of like character).
or
 - set a spring gun.
or
 - possessed a device or attachment of any kind (designed) (used) (intended for use) in suppressing the report of any firearm.
or
 - (sold) (manufactured) (purchased) (possessed) a (shotgun with a barrel less than 18 inches in length) (a firearm designed or capable of discharging automatically more than once by a single function of the trigger), whether or not the defendant knew or had reason to know (the length of the barrel) (that the firearm was designed or capable of discharging automatically).
or

- (possessed) (manufactured) (caused to be manufactured) (sold) (offered for sale) (lent) (purchased) (gave away) any cartridge with can be fired by a handgun and which has a plastic coated bullet with a core of less than 60% lead by weight, whether or not the defendant knew or had reason to know that the plastic coated bullet had a core of less than 60% lead by weight.
or
 - carried a (bludgeon) (sand club) (metal knuckles) (throwing star).
or
 - carried, concealed on defendant's person, a (billy) (blackjack) (slungshot) (insert dangerous or deadly weapon or instrument of like character).
or
 - carried (on defendant's person) (in a [land] [water] [air] vehicle) a (tear gas bomb) (smoke bomb) (projector or object containing a noxious [liquid] [gas] [substance]), with the intent to use the same unlawfully.
or
 - carried, concealed on defendant's person, a (pistol) (revolver) (other firearm) at a time when the defendant was not on the defendant's own (land) (abode) (fixed place of business).
or
 - carried (a shotgun with a barrel less than 18 inches in length) (a firearm designed to discharge or capable of discharging automatically more than once by a single function of the trigger), whether or not the defendant knew or had reason to know (the length of the barrel) (that the firearm was designed or capable of discharging automatically).
2. The defendant within the preceding five years had been (convicted of a nonperson felony under the laws of Kansas) (convicted of a crime in another jurisdiction which is substantially the same as

a Kansas nonperson felony) (released from imprisonment for a nonperson felony).

OR

2. The defendant had been (convicted of a person felony under the laws of Kansas) (convicted of a crime in another jurisdiction which is substantially the same as a Kansas person felony) (released from imprisonment for a person felony), which conviction has not been expunged or for which the defendant has not been pardoned.

3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6305(a)(1) and (2). Violation of this statute is either a severity level 8, nonperson felony or severity level 9, nonperson felony, depending upon the current wrongful act and the nature of the prior conviction. The reader should refer to the statute.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Lassley*, 218 Kan. 752, 545 P.2d 379 (1976), the Court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of aggravated weapons violation under K.S.A. 21-4202 is not a lesser included offense of unlawful possession of a firearm under K.S.A. 21-4204(a)(2).

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

Although speaking to a conviction under K.S.A. 21-4204, criminal possession of a firearm, PIK 3d 64.07, the Kansas Supreme Court stated that when a defendant stipulated to a prior crime necessary for conviction under that statute that the court should mention to the jury neither the number nor nature of the prior convictions. The court should only instruct the jury that it may

consider the convicted felony status element of the crime as proven by agreement of the parties in the form of a stipulation. *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999).

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

63.060**DEFACING IDENTIFICATION MARKS OF A FIREARM**

The defendant is charged with defacing identification marks of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally (changed) (altered) (removed) (obliterated) the (name of the maker) (model) (manufacturer's number) (mark of identification) of any firearm.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6306. Violation of this statute is a severity level 10, nonperson felony. Subsection (c) of the statute provides that possession of an altered firearm is prima facie evidence that the possessor altered the same. This subsection does not create a presumption but only a rule to be applied in determining the sufficiency of the evidence.

Comment

Before July 1, 2011 Revisions to Criminal Code

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

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63.070

CRIMINAL DISCHARGE OF A FIREARM

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant discharged a firearm at a (dwelling) (building) (structure).
2. The defendant did so recklessly and without authority.
3. The (dwelling) (building) (structure) was occupied by a human being at the time, whether or not the defendant knew or had reason to know it was occupied.
- [4. The discharge resulted in (bodily harm) (great bodily harm) to a person during its commission.]

OR

1. The defendant discharged a firearm at a(n) (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (rail-mounted work equipment or rolling stock) (insert other means of conveyance of persons or property).
2. The defendant did so recklessly and without authority.
3. The (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (rail-mounted work equipment or rolling stock) (insert other means of conveyance of persons or property) was occupied by a human being at the time, whether or not the defendant knew or had reason to know it was occupied.
- [4. The discharge resulted in (bodily harm) (great bodily harm) to a person during its commission.]

OR

1. The defendant discharged a firearm at a dwelling.
2. The defendant did so recklessly and without authority.
3. The dwelling was not occupied by a human being.

OR

1. The defendant discharged a firearm upon the land or nonnavigable water of another.
2. The defendant did not have permission to do so from the owner or possessor of the land or water.

OR

1. The defendant discharged a firearm upon or from a (public road) (public road right of way) (railroad right of way).
2. The defendant was not authorized by law to do so.

3. or 4. or 5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6308. The penalties for a violation of this statute range from a class C misdemeanor up to a level 3 person felony. If the State alleges that bodily harm or great bodily harm resulted from the firearm discharge so as to make the crime either a level 3, person felony or level 5, person felony, the trial judge should give the bracketed paragraph in the first and second alternative instructions. In such event, the trial judge may also choose to define those terms for the jury. See PIK 4th 63.090, Weapons Crimes—Defenses, and K.S.A. 21-6308(c) and (d) for statutory exemptions.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

Before July 1, 2011 Revisions to Criminal Code

The crimes of criminal discharge of a weapon and aggravated assault are not multiplicitous. The apprehension of victims is not a necessary element of criminal discharge as it is in the crime of aggravated assault. *State v. Taylor*, 25 Kan. App. 2d 407, 965 P.2d 834 (1998).

The crime of criminal discharge of a weapon does not merge with homicide. *State v. Sims*, 265 Kan. 166, 960 P.2d 1271 (1998).

Criminal discharge of a firearm at an occupied dwelling is an inherently dangerous felony and may serve as the underlying felony for a charge of felony murder. *State v. Lowe*, 276 Kan. 957, 80 P.3d 1156 (2003).

In *State v. Bell*, 276 Kan. 785, 80 P.3d 367 (2003), the Court stated that where criminal discharge of a firearm into an occupied vehicle is the underlying felony for a charge of felony murder, it is a forcible felony and precludes the use of self defense under K.S.A. 21-3214(1).

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

Convictions for aggravated assault and criminal discharge of a firearm at an occupied vehicle involving one victim were not multiplicitous. *State v. Gomez*, 36 Kan. App. 2d 664, 143 P.3d 92 (2006).

K.S.A. 21-4219(b) imposes criminal liability when the defendant discharges a firearm into an occupied building or occupied vehicle but the State is unable to prove the individual had the state of mind required for aggravated assault or aggravated battery. *State v. Farmer*, 285 Kan. 541, 546, 175 P.3d 221 (2008).

63.080

**UNLAWFUL POSSESSION OF FIREARMS
ON GOVERNMENT PROPERTY**

The defendant is charged with unlawful possession of a firearm on government property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant possessed a firearm.**
- 2. The defendant did so (within any building located in the capitol complex) (within the governor's residence) (on the grounds of or in any building on the grounds of the governor's residence) (within any state-owned or leased building if the secretary of administration has prohibited firearms in the building and has conspicuously placed signs clearly stating that firearms are prohibited) (within any county courthouse unless the board of county commissioners has so authorized by county resolution).**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The State need not prove the defendant acted intentionally, knowingly, or recklessly.

Notes on Use

For authority, see K.S.A. 21-6309. Violation of this statute is a class A misdemeanor. See PIK 4th 63.090, Weapons Crimes—Defenses, and K.S.A. 21-6309(c) and (d) for statutory exemptions and K.S.A. 21-6309(e)-(g) for definitions applicable to this statute. This crime is one of the few for which the State is not required to prove the culpable mental state of the defendant.

Comment

Before July 1, 2011 Revisions to Criminal Code

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

63.081

POSSESSION OF FIREARM UNDER THE INFLUENCE

The defendant is charged with possession of a firearm while under the influence of (alcohol) (drugs) (a combination of alcohol and drugs). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly possessed or carried a loaded firearm insert one of the following:**
 - on or about (his) (her) person.**
 - or**
 - within (his) (her) immediate access or control while in a vehicle.**
- 2. At the time, the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs) to the extent that (he) (she) was incapable of safely operating a firearm.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6332. Violation of this statute is a class A, nonperson misdemeanor. In addition to the potential fines and jail time attendant to a class A misdemeanor, a violation of this statute also subjects the violator to a civil penalty of up to \$1,000 as well as revocation of the violator's concealed carry permit. There are two exceptions to the application of this statute, which can be found at K.S.A. 21-6332(c).

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63.082

**POSSESSION OF FIREARM UNDER THE INFLUENCE—
IF CHEMICAL TEST USED**

The law of Kansas provides that a sample of the defendant's (blood) (breath) (urine) (insert other bodily substance) may be taken in order to determine the amount of alcohol or drugs in the defendant's body at the time the alleged offense occurred.

[If analysis of the sample shows there was .08 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that (he) (she) was incapable of safely operating a firearm. The test result is not conclusive, but it should be considered by you along with all the other evidence in the case.]

[If analysis of the sample shows there was less than .08 percent by weight of alcohol in the defendant's blood, that fact may be considered by you along with all other competent evidence to determine if the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs) to a degree that (he) (she) was incapable of safely operating a firearm.]

[If analysis of the sample shows the presence of any narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapacitated, that fact may be considered by you to determine if the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs) to a degree that (he) (she) was incapable of safely operating a firearm.]

You are instructed that evidence derived from a (blood) (breath) (urine) (insert other bodily substance) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).

Notes on Use

For authority, see K.S.A. 21-6332. This instruction is to be used in conjunction with PIK 4th 63.081, Possession of Firearm Under the Influence, when chemical tests have been administered.

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63.090

WEAPONS CRIMES—DEFENSES

It is a defense to the charge of insert name of crime, as defined in Instruction No. _____, that insert here any relevant exemptions found in the statute under which defendant is charged.

Notes on Use

If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should also be given. The statutory exemptions applicable to weapons crimes are found at K.S.A. 21-6301(c)-(l), K.S.A. 21-6302(c) and (d), K.S.A. 21-6308(c) and (d), K.S.A. 21-6309(c)-(e) and K.S.A. 75-7c01 *et seq.*

Comment

Before July 1, 2011 Revisions to Criminal Code

State v. Lassley, 218 Kan. 752, 545 P.2d 379 (1976), holds that a construction worker who carried a six-inch knife which he used as a tool of his trade did not come within the exempt status expressly recognized in K.S.A. 21-4201(2). The fact that the knife may have been used in his trade was not a defense to the prescribed act of knowingly carrying a dangerous knife concealed on his person.

In *State v. Hargis*, 5 Kan. App. 2d 608, 620 P.2d 1181 (1980), the Court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of his commission as a special deputy or school security guard.

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63.100**UNLAWFUL ENDANGERMENT**

The defendant is charged with unlawful endangerment. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly protected or attempted to protect the (manufacture) (cultivation) of a controlled substance.**
- 2. The defendant did so by (creating) (setting up) (building) (erecting) (using) any device or weapon which (caused great bodily harm) (caused bodily harm) (is intended to cause bodily harm to another person).**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6310. Penalties for a violation of this statute range from a level 5, person felony to a level 8, nonperson felony. K.S.A. 21-6310(d) provides that the terms "manufacture" and "cultivation" are defined at K.S.A. 21-5701.

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63.110**CRIMES DEALING WITH EXPLOSIVES**

The defendant is charged with (criminal possession of explosives) (criminal disposal of explosives) (carrying concealed explosives). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant possessed an explosive or detonating device.**
- 2. The defendant, within five years preceding such possession, has been (convicted of a felony in Kansas or other jurisdiction) (released from imprisonment for a felony).**

OR

- 1. The defendant knowingly and without lawful authority distributed an explosive or detonating device to a person.**
- 2. The recipient of the explosive or detonating device was less than 21 years old. The State need not prove the defendant knew the recipient's age.**

OR

- 1. The defendant knowingly and without lawful authority distributed an explosive or detonating device to a person.**
- 2. The defendant knew the recipient of the explosive or detonating device (was both addicted to and an unlawful user of a controlled substance) (had been convicted of a felony within the preceding five years in Kansas or other jurisdiction) (had been released from imprisonment for a felony within the preceding five years).**

OR

1. **The defendant carried an explosive or detonating device.**
2. **The defendant did so in a wholly or partly concealed manner.**
3. **This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

The term "explosives" means any chemical compound, mixture or device, of which the primary purpose is to function by explosion, and includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord and igniters.

["Possession" means having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-6312. Violation of K.S.A. 21-6312(a) is a severity level 7, person felony. Violation of K.S.A. 21-6312(b) is a severity level 10, person felony. Violation of K.S.A. 21-6312(c) is a class A person misdemeanor.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

Comment

Before July 1, 2011 Revisions to Criminal Code

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

Although speaking to a conviction under K.S.A. 21-4204, criminal possession of a firearm, PIK 3d 64.07, the Kansas Supreme Court stated that when a defendant stipulated to a prior crime necessary for conviction under that statute that the court should mention to the jury neither the number nor nature of the prior convictions. The court should only instruct the jury that it may consider the convicted felony status element of the crime as proven by agreement of the parties in the form of a stipulation. *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999).

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001).

63.120**RECRUITING CRIMINAL STREET GANG MEMBERS**

**The defendant is charged with recruiting criminal street gang members.
The defendant pleads not guilty.**

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally (caused) (encouraged) (solicited) (recruited) another person to join a criminal street gang.**
- 2. A condition of membership of the criminal street gang was (commission of any crime) (initiation by submission to a sexual or physical assault that [is criminal in nature] [would be criminal absent consent by the initiated]).**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6314. Violation of this statute is a severity level 6, person felony. The term "criminal street gang" is defined at K.S.A. 21-6313(a). The applicable portions of that definition should immediately follow the elements above as part of this instruction.

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63.130

ENDANGERING/AGGRAVATED ENDANGERING THE FOOD SUPPLY

The defendant is charged with [aggravated] endangering the food supply. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly insert one of the following:
 - brought into this state any domestic animal which was at the time infected with insert contagious or infectious disease.
 - or
 - brought into this state any animal which had been exposed to insert contagious or infectious disease.
 - or
 - exposed any animal in this state to insert contagious or infectious disease.
 - or
 - exposed any (raw agricultural commodity) (animal feed) (processed food) to (a contaminant) (insert contagious or infectious disease).
 - or
 - brought or released into this state insert name of plant pest.
 - or
 - exposed any plant to insert name of plant pest.

- [2. The defendant did so with the intent to cause (damage to [animals] [plants]) (economic harm) (social unrest) (illness, injury or death to a person or persons).]

- [2. or 3. Insert name of disease or plant pest is a (contagious or infectious disease) (plant pest).]

2. or 3. or 4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

["Contagious or infectious disease" means any disease which can be spread from one subject to another by direct or indirect contact or by an intermediate agent.]

["Plant pest" includes any stage of development of any insect, nematode, arachnid, or any other invertebrate animal, or any bacteria, fungus, virus, weed or any other parasitic plant or microorganism, or any toxicant, which can injure plants or plant products or which can cause a threat to public health.]

Notes on Use

For authority, see K.S.A. 21-6317. When the aggravated crime is charged, the first of the bracketed second elements should be used, with the applicable type of intent. Endangering the food supply is a class A, nonperson misdemeanor except when the contagious or infectious disease is foot-and-mouth disease in which case it is a severity level 4, nonperson felony. Aggravated endangering the food supply is a severity level 3, person felony or severity level 3, nonperson felony depending upon the particular aggravating factor. The definitions applicable to this crime are found at K.S.A. 21-6317(e). There is no definition of "contaminant" in Chapter 21. The several statutory exemptions to this crime are found at K.S.A. 21-6317(d) and 2-2112 *et seq.*

If the state's charges are based on a contagious or infectious disease that is not included in the statutory, non-exclusive list, proof that the charged disease meets the statutory definition becomes an additional element, using the bracketed element, "2 or 3," as applicable, and the statutory definition for "contagious or infectious disease." The same process applies to a charge involving a non-included "plant pest."

63.131

**UNLAWFUL TAMPERING WITH ELECTRONIC
MONITORING EQUIPMENT**

The defendant is charged with unlawful tampering with electronic monitoring equipment. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly and without authorization (removed) (disabled) (altered) (tampered with) (damaged) (destroyed) electronic monitoring equipment.**
- 2. The electronic monitoring equipment was being used as a condition of (court-ordered supervision) (post-release supervision) (parole).**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6322. Violation of this statute is a severity level 6, nonperson felony.

63.140

FAILURE TO REGISTER AS AN OFFENDER

The defendant is charged with failure to register as an offender. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant had been (convicted of insert crime) (adjudicated as a juvenile offender for the commission of insert offense).
2. The defendant failed to insert here the appropriate violation as set out in K.S.A. 22-4905 through K.S.A. 22-4907.
3. This act occurred on or about the _____ day of _____, _____.
4. The defendant's (conviction for insert crime) (adjudication as a juvenile offender for the commission of insert offense) was in _____ County, Kansas.

OR

4. The defendant was required to register as an offender in _____ County, Kansas.

[A (person convicted of insert crime) (adjudicated as a juvenile offender for the commission of insert offense) must register in any county in which the person resides, maintains employment, or attends school; or any county in which the person intends to reside, intends to maintain employment, or intends to attend school.]

OR

4. The defendant resides in _____ County, Kansas.

OR

4. The defendant was located in _____ County, Kansas, during the time defendant failed to insert the appropriate violation as set out in K.S.A. 22-4905 through 22-4907.

Notes on Use

For authority, see K.S.A. 22-4901 *et seq.* K.S.A. 22-4902 lists the offenses subject to registration pursuant to the Kansas Offender Registration Act. Failure to register is a severity level 6, person felony upon a first conviction; severity level 5, person felony upon a second conviction; and severity level 3, person felony upon a third or subsequent conviction. If the violation consists only of failing to remit full payment within 15 days as required by K.S.A. 22-4905(l), the conviction is a class A misdemeanor; failure to remit such payment when two or more full payments have not been made is a severity level 9, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

When a prior conviction is an element of the crime charged, it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

In *State v. Snelling*, 266 Kan. 986, 975 P.2d 259 (1999), the Court held that the registration and notification provisions of the Kansas Offender Registration Act do not constitute cruel and unusual punishment.

In *State v. Wilkinson*, 269 Kan. 603, 9 P.3d 1 (2000), the Court held the registration requirement triggered by conviction does not violate procedural due process under the United States or Kansas Constitutions.

An order requiring registration for an offense committed prior to the enactment of the Kansas Sex Offender Registration Act did not constitute an ex post facto violation. *State v. Hemby*, 264 Kan. 542, 957 P.2d 428 (1998). In accord, see *State v. Armbrust*, 274 Kan. 1089, 59 P.3d 1000 (2002), where the Court recognized that the conduct punished by the application of the Kansas Offender Registration Act was not the violent offense which triggered the registration requirements, but the failure to properly register under the Act.

Offender registration is not an increased punishment which implicates constitutional protections. In *State v. Chambers*, 36 Kan. App. 2d 228, 138 P.3d 405, *rev. denied* 282 Kan. 792 (2006), the court held the district court did not violate defendant's right to a jury trial by making a factual finding that the crime was sexually motivated and defendant was subject to registration under the act.

The district court's factual finding that the defendant used a deadly weapon, which resulted in the court's order for defendant to register under KORA, did not violate the defendant's right

to a jury trial under the 6th or 14th Amendment to the Constitution of the United States. *State v. Unrein*, 47 Kan. App. 2d 366, 274 P.3d 691 (2012).

The conviction that creates the registration requirement is an element of the offense of Failure to Register As An Offender and cannot be counted in determining the criminal history score. See *State v. Pottoroff*, 32 Kan. App. 2d 1161, 96 P.3d 280 (2004).

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63.150

AGGRAVATED FAILURE TO REGISTER AS AN OFFENDER

The defendant is charged with failure to register as an offender. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant had been (convicted of insert crime) (adjudicated as a juvenile offender for the commission of insert offense).
2. The defendant failed to insert here the appropriate violation as set out in K.S.A. 22-4905 through K.S.A. 22-4907.
3. The defendant's failure began on _____, _____ and continued for more than 180 consecutive days.
4. The defendant's (conviction for insert crime) (adjudication as a juvenile offender for the commission of insert offense) was in _____ County, Kansas.

OR

4. The defendant was required to register as an offender in _____ County, Kansas.

[A (person convicted of insert crime) (adjudicated as a juvenile offender for the commission of insert offense) must register in any county in which the person resides, maintains employment, or attends school; or any county in which the person intends to reside, intends to maintain employment, or intends to attend school.]

OR

4. The defendant resides in _____ County, Kansas.

OR

4. The defendant was located in _____ County, Kansas, during the time defendant failed to insert the appropriate violation as set out in K.S.A. 22-4905 through 22-4907.

Notes on Use

For authority, see K.S.A. 22-4901 *et seq.* K.S.A. 22-4902 lists the offenses subject to registration pursuant to the Kansas Offender Registration Act. Aggravated failure to register is a severity level 3, person felony. If the violation consists only of failing to remit full payment within 15 days as required by K.S.A. 22-4905(1), the conviction is a class A misdemeanor; failure to remit such payment when two or more full payments have not been made is a severity level 9, person felony.

63.160

KANSAS RICO ACT—PROCEEDS
K.S.A. 21-6329(a)(1)

Elements Instruction

The defendant is charged with violating the Kansas Racketeer Influenced and Corrupt Organization Act (Kansas RICO Act). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant is a covered person under the Kansas RICO Act.
2. The defendant recklessly received proceeds derived, directly or indirectly, insert one of the following:
 - from a pattern of racketeering activity.
 - or
 - through the collection of an unlawful debt.
3. The defendant used or invested, directly or indirectly, any part of the proceeds [or proceeds derived from the investment or use of those proceeds] insert one of the following:
 - to acquire any (title) (right) (interest) (equity) in real property.
 - or
 - in the establishment or operation of any enterprise.
4. One or more of these acts occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6329(a)(1). Violation of this section is a severity level 2, person felony.

If this instruction is given, it must be accompanied by 63.161, 63.162, and 63.163.

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63.161

KANSAS RICO ACT—PROCEEDS
K.S.A. 21-6329(a)(1)

First Element—Covered Person

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant is a criminal street gang member. A criminal street gang member is a person who has admitted to being a member of a criminal street gang or who meets three or more of the following criteria: insert applicable criteria from K.S.A. 21-6313(b)(2)(A)-(J).

OR

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant is a criminal street gang associate. A criminal street gang associate is a person who has admitted to being associated with a criminal street gang or who meets two or more of the following criteria: insert applicable criteria from K.S.A. 21-6313(b)(2)(A)-(J).

OR

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant (has engaged) (is engaging) in (unlawful [manufacturing] [cultivation] [distribution] of controlled substances) (human trafficking) (aggravated human trafficking).

[The elements of insert the applicable controlled substances or human trafficking violation(s) are as follows: _____.]

Notes on Use

For authority, see K.S.A. 21-6328(b). For definitions of criminal street gang member/associate, see K.S.A. 21-6313.

The instruction should include only the criteria in K.S.A. 21-6313(b)(2)(A)-(J) that are supported by the evidence.

The elements of the controlled substances or human trafficking violation need not be included when the violation is based on a prior conviction.

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63.162

KANSAS RICO ACT—PROCEEDS
K.S.A. 21-6329(a)(1)

**Second Element—Receipt of Proceeds From
 Racketeering Activity or Collection of Unlawful Debt**

The second element which the State is required to prove is that the defendant intentionally received proceeds derived, directly or indirectly, from a pattern of racketeering activity.

A person engages in racketeering activity when the person (commits) (attempts to commit) (conspires to commit) (solicits another person to commit) (coerces another person to commit) (intimidates another person to commit) certain crimes.

To show a pattern of racketeering activity, the State must prove the defendant engaged in at least two incidents of racketeering activity, the last of which must have occurred within five years of a prior incident. To constitute a pattern, the State must prove that the incidents of racketeering activity (have the same or similar [intent] [results] [accomplices] [victims] [methods of commission]) (are interrelated by distinguishing characteristics, and are not isolated incidents).

In this case the State claims the crimes constituting racketeering activity are insert applicable crimes.

The claims the State must prove to establish the crime of insert crime are (set forth in Instruction No. ____)
 (as follows: _____).

OR

The second element which the State is required to prove is that the defendant intentionally received proceeds derived, directly or indirectly, through the collection of an unlawful debt.

An unlawful debt is one which is legally unenforceable in whole or in part because it was incurred or contracted through insert applicable violation from K.S.A. 21-6328(i)(1) or (2).

The claims the State must prove to establish the crime of insert applicable violation are (set forth in Instruction No. ____)
 (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-6328(e), (f), and (i).

The definition of "pattern of racketeering activity" requires at least one incident occur after the effective date of the Kansas RICO Act, July 1, 2013.

Periods of incarceration are excluded in calculating the five year time period between racketeering incidents. If the evidence warrants it, the jury should be instructed on this point.

63.163

**KANSAS RICO ACT—PROCEEDS
K.S.A. 21-6329(a)(1)****Third Element—Use or Investment of Proceeds
For Real Property or Enterprise**

The third element which the State is required to prove is that the defendant intentionally used or invested, directly or indirectly, any part of the proceeds [or proceeds derived from the investment or use of those proceeds] to acquire any (title) (right) (interest) (equity) in real property.

"Real property" is any interest in real property, including a lease or mortgage upon the property.

OR

The third element which the State is required to prove is that the defendant intentionally used or invested, directly or indirectly, any part of the proceeds [or proceeds derived from the investment or use of those proceeds] in the establishment or operation of any enterprise.

"Enterprise" includes insert the appropriate portion of the definition from K.S.A. 21-6328(d) as alleged by the State. [A criminal street gang constitutes an enterprise.]

Notes on Use

For authority, see K.S.A. 21-6328(d) and (g). "Criminal street gang" is defined in K.S.A. 21-6313(a). The definition should be given when the subject enterprise is a criminal street gang.

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63.170

KANSAS RICO ACT—INTEREST OR CONTROL
K.S.A. 21-6329(a)(2)

Elements Instruction

The defendant is charged with violating the Kansas Racketeer Influenced and Corrupt Organization Act (Kansas RICO Act). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant is a covered person under the Kansas RICO Act.**
- 2. The defendant recklessly acquired or maintained, directly or indirectly, any interest in or control of (an enterprise) (real property).**
- 3. The defendant did so through insert one of the following:**
 - a pattern of racketeering activity.**
 - or**
 - the collection of an unlawful debt.**
- 4. One or more of these acts occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6329(a)(2). Violation of this section is a severity level 2, person felony.

If this instruction is given, it must be accompanied by 63.171, 63.172, and 63.173.

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63.171

KANSAS RICO ACT—INTEREST OR CONTROL
K.S.A. 21-6329(a)(2)

First Element—Covered Person

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant is a criminal street gang member. A criminal street gang member is a person who has admitted to being a member of a criminal street gang or who meets three or more of the following criteria: insert applicable criteria from K.S.A. 21-6313(b)(2)(A)-(J).

OR

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant is a criminal street gang associate. A criminal street gang associate is a person who has admitted to being associated with a criminal street gang or who meets two or more of the following criteria: insert applicable criteria from K.S.A. 21-6313(b)(2)(A)-(J).

OR

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant (has engaged) (is engaging) in (unlawful [manufacturing] [cultivation] [distribution] of controlled substances) (human trafficking) (aggravated human trafficking).

[The elements of insert the applicable controlled substances or human trafficking violation(s) are as follows: _____.]

Notes on Use

For authority, see K.S.A. 21-6328(b). For definitions of criminal street gang member/associate, see K.S.A. 21-6313.

The instruction should include only the criteria in K.S.A. 21-6313(b)(2)(A)-(J) that are supported by the evidence.

The elements of the controlled substances or human trafficking violation need not be included when the violation is based on a prior conviction.

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63.172

KANSAS RICO ACT—INTEREST OR CONTROL
K.S.A. 21-6329(a)(2)

**Second Element—Acquired or Maintained Interest or Control
of Enterprise or Real Property**

The second element which the State is required to prove is that the defendant intentionally, knowingly, or recklessly acquired or maintained, directly or indirectly, any interest in or control of any enterprise.

"Enterprise" includes insert the appropriate portion of the definition from K.S.A. 21-6328(d) as alleged by the State. [A criminal street gang constitutes an enterprise.]

OR

The second element which the State is required to prove is that the defendant intentionally, knowingly, or recklessly acquired or maintained, directly or indirectly, any interest in or control of real property.

"Real property" is any interest in real property, including a lease or mortgage upon the property.

Notes on Use

For authority, see K.S.A. 21-6328(d) and (g). "Criminal street gang" is defined in K.S.A. 21-6313(a). The definition should be given when the subject enterprise is a criminal street gang.

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63.173

KANSAS RICO ACT—INTEREST OR CONTROL
K.S.A. 21-6329(a)(2)

Third Element—Acquired or Maintained Interest or Control Through Racketeering Activity or Collection of Unlawful Debt

The third element which the State is required to prove is that the defendant intentionally, knowingly, or recklessly acquired or maintained the interest in or control of the (enterprise) (real property) through a pattern of racketeering activity.

A person engages in racketeering activity when the person (commits) (attempts to commit) (conspires to commit) (solicits another person to commit) (coerces another person to commit) (intimidates another person to commit) certain crimes.

To show a pattern of racketeering activity, the State must prove the defendant engaged in at least two incidents of racketeering activity, the last of which must have occurred within five years of a prior incident. To constitute a pattern, the State must prove that the incidents of racketeering activity (have the same or similar [intent] [result] [accomplices] [victims] [methods of commission]) (are interrelated by distinguishing characteristics, and are not isolated incidents).

In this case the State claims the crimes constituting racketeering activity are insert applicable crimes.

The claims the State must prove to establish the crime of insert crime are (set forth in Instruction No. __) (as follows:).

OR

The third element which the State is required to prove is that the defendant intentionally, knowingly, or recklessly acquired or maintained the interest in or control of the (enterprise) (real property) through the collection of an unlawful debt.

An unlawful debt is one which is legally unenforceable in whole or in part because it was incurred or contracted through insert applicable violation from K.S.A. 21-6328(i)(1) or (2).

The claims the State must prove to establish the crime of insert applicable violation are (set forth in Instruction No. __) (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-6328(e), (f), and (i).

The definition of "pattern of racketeering activity" requires at least one incident occur after the effective date of the Kansas RICO Act, July 1, 2013.

Periods of incarceration are excluded in calculating the five year time period between racketeering incidents. If the evidence warrants it, the jury should be instructed on this point.

63.180

**KANSAS RICO ACT—CONDUCT OR PARTICIPATION
K.S.A. 21-6329(a)(3)****Elements Instruction**

The defendant is charged with violating the Kansas Racketeer Influenced and Corrupt Organization Act (Kansas RICO Act). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant is a covered person under the Kansas RICO Act.
2. The defendant was (employed by) (associated with) an enterprise.
3. The defendant recklessly conducted or participated in the enterprise, directly or indirectly, through insert one of the following:
 - a pattern of racketeering activity.
 - or
 - the collection of an unlawful debt.
4. One or more of these acts occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6329(a)(3). Violation of this section is a severity level 2, person felony.

If this instruction is given, it must be accompanied by 63.181, 63.182, and 63.183.

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63.181

KANSAS RICO ACT—CONDUCT OR PARTICIPATION
K.S.A. 21-6329(a)(3)

First Element—Covered Person

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant is a criminal street gang member. A criminal street gang member is a person who has admitted to being a member of a criminal street gang or who meets three or more of the following criteria: insert applicable criteria from K.S.A. 21-6313(b)(2)(A)-(J).

OR

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant is a criminal street gang associate. A criminal street gang associate is a person who has admitted to being associated with a criminal street gang or who meets two or more of the following criteria: insert applicable criteria from K.S.A. 21-6313(b)(2)(A)-(J).

OR

To establish that the defendant is a covered person under the Kansas RICO Act, the State must prove that the defendant (has engaged) (is engaging) in (unlawful [manufacturing] [cultivation] [distribution] of controlled substances) (human trafficking) (aggravated human trafficking).

[The elements of insert the applicable controlled substances or human trafficking violation(s) are as follows: _____.]

Notes on Use

For authority, see K.S.A. 21-6328(b). For definitions of criminal street gang member/associate, see K.S.A. 21-6313.

The instruction should include only the criteria in K.S.A. 21-6313(b)(2)(A)-(J) that are supported by the evidence.

The elements of the controlled substances or human trafficking violation need not be included when the violation is based on a prior conviction.

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63.182

**KANSAS RICO ACT—CONDUCT OR PARTICIPATION
K.S.A. 21-6329(a)(3)****Second Element—Employed By or Associated With an Enterprise**

The second element which the State is required to prove is that the defendant was (employed by) (associated with) an enterprise.

"Enterprise" includes (insert the appropriate portion of the definition from K.S.A. 21-6328(d) as alleged by the State). [A criminal street gang constitutes an enterprise.]

Notes on Use

For authority, see K.S.A. 21-6328(d). "Criminal street gang" is defined in K.S.A. 21-6313(a). The definition should be given when the subject enterprise is a criminal street gang.

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63.183

KANSAS RICO ACT—CONDUCT OR PARTICIPATION
K.S.A. 21-6329(a)(3)

Third Element—Conducted or Participated in Enterprise Through Racketeering Activity or Collection of Unlawful Debt

The third element which the State is required to prove is that the defendant intentionally, knowingly, or recklessly conducted or participated in the enterprise, directly or indirectly, through a pattern of racketeering activity.

A person engages in racketeering activity when the person (commits) (attempts to commit) (conspires to commit) (solicits another person to commit) (coerces another person to commit) (intimidates another person to commit) certain crimes.

To show a pattern of racketeering activity, the State must prove the defendant engaged in at least two incidents of racketeering activity, the last of which must have occurred within five years of a prior incident. To constitute a pattern, the State must prove that the incidents of racketeering activity (have the same or similar [intent] [result] [accomplices] [victims] [methods of commission]) (are interrelated by distinguishing characteristics, and are not isolated incidents).

In this case the State claims the crimes constituting racketeering activity are insert applicable crimes.

The claims the State must prove to establish the crime of insert crime are (set forth in Instruction No. __) (as follows:).

OR

The third element which the State is required to prove is that the defendant intentionally, knowingly, or recklessly conducted or participated in the enterprise, directly or indirectly, through the collection of an unlawful debt.

An unlawful debt is one which is legally unenforceable in whole or in part because it was incurred or contracted through insert applicable violation from K.S.A. 21-6328(i)(1) or (2).

The claims the State must prove to establish the crime of insert applicable violation are (set forth in Instruction No. __) (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-6328(e), (f), and (i).

The definition of "pattern of racketeering activity" requires at least one incident occur after the effective date of the Kansas RICO Act, July 1, 2013

Periods of incarceration are excluded in calculating the five year time period between racketeering incidents. If the evidence warrants it, the jury should be instructed on this point.

64.010

PROMOTING OBSCENITY

The defendant is charged with promoting obscenity. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant recklessly insert one of the following:**
 - **(manufactured) (mailed) (transmitted) (published) (distributed) (presented) (exhibited) (advertised) obscene material or an obscene device.**
 - or**
 - **possessed (obscene material) (an obscene device) with intent to (mail) (transmit) (publish) (distribute) (present) (exhibit) (advertise) such (material) (device).**
 - or**
 - **(offered) (agreed) to (manufacture) (mail) (transmit) (publish) (distribute) (present) (exhibit) (advertise) obscene material or an obscene device.**
 - or**
 - **(produced) (presented) (directed) an obscene performance or participated in a portion thereof which was obscene or contributed to its obscenity.**
- 2. This act occurred on or about the _____ day of _____, _____ in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6401. Promoting obscenity is a class A, nonperson misdemeanor for the first conviction. For second and subsequent convictions, this offense is a severity level 9, person felony. For defenses, see PIK 4th 64.050. For definitions, see PIK 4th 64.030, Promoting Obscenity—Definitions. For definition of "recklessness," see K.S.A. 21-5202(c) and (j).

Comment

Before July 1, 2011 Revisions to Criminal Code

The statutory definition of obscenity as originally contained in K.S.A. 21-4301 was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct. 1304 (1957). In June of 1973, the United States Supreme Court decided *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), which substantially altered the obscenity standards which both state and federal courts must apply. In *Miller*, the Supreme Court held that state statutes designed to regulate obscene material must be limited to works which depict or describe *sexual* conduct. The prohibited conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." Furthermore, *Miller* held that statutes prohibiting obscenity must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller* rejected the standard that the work must be utterly without redeeming social value. Additionally, the Court rejected a national standard for obscene material within the context of the First Amendment.

In March, 1976 in *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976), the Kansas Supreme Court, following *Miller*, upheld the constitutionality of the then existing obscenity statute by construing the word "obscenity" as a word of constitutional meaning. In 1976, the Kansas Legislature amended K.S.A. 21-4301 and 21-4301a to change the statutory definition of obscenity to comply with the judicial definition of obscenity as contained in these cases. The 1976 statute, however, did not change the basic elements of the offense of promoting obscenity other than redefining the term "obscenity" itself.

In *State v. Allen & Rosebaugh*, 1 Kan. App. 2d 32, 562 P.2d 445 (1977), the Kansas Court of Appeals overturned the 1974 convictions of two defendants charged under K.S.A. 21-4301 because the definition of "obscene" prior to 1976 was found to be unconstitutionally overbroad. It held that the decision in *State v. A Motion Picture Entitled "The Bet,"* supra, redefining the word "obscenity" could not be applied retroactively to the conduct of the defendants in 1974.

In *State v. Loudermilk*, 221 Kan. 157, 160, 557 P.2d 1229 (1976), the Court referred to 21-4301 and 21-4301a (promoting obscenity) as crimes in which a previous conviction is not an element of the substantive crime but serves only to enhance punishment.

In *New York v. Ferber*, 458 U.S. 747, 73 L.Ed 2d 1113, 102 S.Ct. 3348 (1982), which upheld a New York criminal statute prohibiting the knowing promotion of sexual performances by children under 16, by distribution of material depicting such performances, the Court followed the obscenity standards of *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973). *Ferber* held that the states are entitled to greater leeway in the regulation of pornographic depictions of children than in the case of adults.

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301 was upheld against allegations that the statute was unconstitutional as a violation of due process, because the definition of "obscenity" was vague and overbroad and the statute was an invalid exercise of the police power.

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead,

the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office. In *DPR, Inc. v. City of Pittsburg*, 24 Kan. App. 2d 703, 953 P.2d 231 (1998), at page 718, *State v. Hughes* is discussed in some detail in determining that a municipal ordinance regulating nudity in a drinking establishment was not unconstitutionally vague.

Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

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64.020

PROMOTING OBSCENITY TO A MINOR

The defendant is charged with promoting obscenity to a minor. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant recklessly insert any of the four violations listed in PIK 4th 64.010, Promoting Obscenity.**
- 2. Insert initials of child (the recipient of the obscene [material] [device]) (a member of the audience of the obscene performance) was less than 18 years of age. [The State need not prove defendant knew the child's age.]**
- 3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6401(b). Promoting obscenity to a minor is a class A, nonperson misdemeanor, for the first conviction. For second and subsequent convictions, this offense is a severity level 8, person felony. For defenses, see PIK 4th 64.050.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b). In Element No. 2, the bracketed language should not be given if the defendant claims he/she had reasonable cause to believe the minor involved was 18 or more years old and the minor exhibited to defendant what appeared to be an official identification indicating that the minor was 18 or more years old. See K.S.A. 21-6401(h)(1).

For definitions, see PIK 4th 64.030, Promoting Obscenity—Definitions.

Comment

Before July 1, 2011 Revisions to Criminal Code

Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

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64.030

PROMOTING OBSCENITY—DEFINITIONS

Certain terms used in the preceding instructions are defined as follows:

Obscene:

Any material or performance is "obscene" if:

- (a) the average person applying contemporary community standards would find that the material or performance, taken as a whole, appeals to the prurient interest;**
- (b) the average person applying contemporary community standards would find the material or performance has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy, or masturbation, excretory functions, sadomasochistic abuse, or lewd exhibition of the genitals; and**
- (c) taken as a whole, a reasonable person would find the material or performance taken as a whole, lacks serious literary, educational, artistic, political, or scientific value.**

"Material" means any tangible thing, which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or other manner.

"Obscene device" means a device, including a dildo or artificial vagina, designed or marketed to be used primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy.

"Performance" means any play, motion picture, dance, or other exhibition performed before any audience.

"Prurient interest" means an unhealthy, unwholesome, morbid, degrading, and shameful interest in sex.

"Sexual intercourse" means any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse. Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of performance of generally recognized health care practices, or a body cavity search conducted by law enforcement officers.

"Sodomy" means oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal. It does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices, or a body cavity search conducted by law enforcement officers.

"Wholesaler" means a person who distributes or offers for distribution obscene materials or devices only for resale and not to the consumer and who does not manufacture, publish, or produce such materials or devices.

Notes on Use

For authority, see K.S.A. 21-6401.

A jury may not understand the meaning of the term "prurient interest." The definition of prurient interest is adopted from *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980).

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office.

64.040**PROMOTING OBSCENITY—INFERENCE OF KNOWLEDGE OR RECKLESSNESS FROM PROMOTION**

If you find the defendant promoted obscene materials or devices by emphasizing their prurient appeal or if you find the defendant is not a wholesaler, and promoted the materials or devices in the course of (his) (her) business, you may infer that the defendant did so knowingly or recklessly. You may consider this inference along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving that the defendant acted knowingly or recklessly. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-6401(e).

The term "prurient appeal" is used in the statute. See *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980), where the use of the word "prurient" is discussed.

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64.050

PROMOTING OBSCENITY—DEFENSES

It is a defense to the charge of promoting obscenity that insert one of the following:

- **the (persons to whom the allegedly obscene [material] [device] was disseminated) (audience to an allegedly obscene performance) consisted of (persons) (institutions) having (scientific) (educational) (governmental) justification for (possessing) (reviewing) the same.**
or
- **the defendant was a(n) (officer) (director) (trustee) (employee of a public library) and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.**
or
- **the allegedly obscene (material) (device) was (purchased) (leased) (acquired) by a (public school) (private school) (parochial school) (college) (university), and that such (material) (device) was (sold) (leased) (distributed) (disseminated) by a (teacher) (instructor) (professor) (faculty member) (administrator) of such school as part of or incidental to an approved (course) (program of instruction) at such school.**
or
- **the defendant was (a projectionist) (an assistant projectionist) having no financial interest in the show or in the place of presentation other than regular employment as (a projectionist) (an assistant projectionist) and had no personal knowledge of the contents of the motion picture and the motion picture was shown commercially to the general public.**

Notes on Use

For authority, see K.S.A. 21-6401(g)-(i).

If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

64.060

PROMOTING OBSCENITY TO A MINOR—DEFENSES

It is a defense to the charge of promoting obscenity to a minor that insert one of the following:

- the defendant had reasonable cause to believe that the minor involved was 18 or more years old and the minor exhibited to the defendant a (draft card) (driver's license) (birth certificate) (official or apparently official document) purporting to establish that the minor was 18 or more years old.

or

- the allegedly obscene (material) (device) was (purchased) (leased) (acquired) by a (public school) (private school) (parochial school) (college) (university), and that such (material) (device) was (sold) (leased) (distributed) (disseminated) by a (teacher) (instructor) (professor) (faculty member) (administrator) of such school as part of or incidental to an approved (course) (program of instruction) at such school.

or

- the (persons to whom the allegedly obscene material was disseminated) (audience to an allegedly obscene performance) consisted of (persons) (institutions) having (scientific) (educational) (governmental) justification for (possessing) (reviewing) the same.

or

- an exhibition in a state of nudity was for (a bona fide [scientific] [medical] purpose) ([an educational] [a cultural] purpose for a bona fide [school] [museum] [library]).

Notes on Use

For authority, see K.S.A. 21-6401(g)-(h).

If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

64.070

SELLING SEXUAL RELATIONS

The defendant is charged with selling sexual relations. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (performed for hire) (offered or agreed to perform for hire where there is an exchange of value) the act of (sexual intercourse) (sodomy) (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the defendant or another person).**
- 2. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6419. Selling sexual relations is a class B, nonperson misdemeanor. If the act under Element No. 1 is sexual intercourse, PIK 4th 55.010, Sexual Intercourse—Definition, should be given. If the act under Element No. 1 is sodomy, PIK 4th 55.020, Sex Offenses—Definitions, should be given.

In the event the charging document limits the sexual desires to those of one—the defendant or another person—the trial court should consider modifications to the instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *City of Junction City v. White*, 2 Kan. App. 2d 403, 580 P.2d 891 (1978), the Court of Appeals held that it was within the police power of the State to prohibit prostitution and that the right of privacy does not protect solicitation of customers by a prostitute.

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), the Kansas Supreme Court held that K.S.A. 21-3512, which prohibits prostitution, is not unconstitutionally vague or overbroad. The language gives a definite warning as to the conduct proscribed when measured by common understanding and practice.

64.071

SELLING SEXUAL RELATIONS—DEFENSE

It is a defense to the charge of selling sexual relations if the defendant committed the offense because such defendant was subjected to (human trafficking) (aggravated human trafficking) (commercial exploitation of a child).

The elements of (human trafficking) (aggravated human trafficking) (commercial exploitation of a child) are as follows: _____.

Notes on Use

For authority, see K.S.A. 21-6419(c). If this instruction is given, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

64.080

PROMOTING THE SALE OF SEXUAL RELATIONS—PLACES

The defendant is charged with the sale of sexual relations. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly insert one of the following:
 - (established) (owned) (maintained) (managed) any property, whether real or personal, where sexual relations were (being sold) (offered for sale) by a person 18 or more years old.
 - or
 - participated in the (establishment) (ownership) (maintenance) (management) of any property, whether real or personal, where sexual relations were (being sold) (offered for sale) by a person 18 or more years old.
 - or
 - permitted any property, whether real or personal, partially or wholly owned or controlled by the defendant to be used as a place where sexual relations were (being sold) (offered for sale) by a person 18 or more years old.
 - or
 - was employed to perform any act of insert act prohibited by K.S.A. 21-6420(a)(1) - (2).
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6420(a)(1), (2), and (8). A first conviction of promoting the sale of sexual relations is a severity level 9, person felony. A second and subsequent conviction of promoting the sale of sexual relations is a severity level 7, person felony.

64.090

PROMOTING THE SALE OF SEXUAL RELATIONS—PEOPLE

The defendant is charged with promoting the sale of sexual relations.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant knowingly insert one of the following:
 - procured a person selling sexual relations who was 18 or more years old for a place where sexual relations were (being sold) (offered for sale).
or
 - induced another person who was 18 or more years old to become a person who sells sexual relations.
or
 - solicited a patron for a (person 18 or more years old selling sexual relations) (place where sexual relations were [being sold] [offered for sale]).
or
 - procured a person 18 or more years old who was selling sexual relations for a patron.
or
 - (procured transportation for) (paid for the transportation of) (transported) a person 18 or more years old with the intent to assist or promote that person's engaging in the sale of sexual relations.
or
 - was employed to perform any act of insert act prohibited by K.S.A. 21-6420(a)(3) - (7).

2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6420(a)(3) - (8). A first conviction of promoting the sale of sexual relations is a severity level 9, person felony. A second and subsequent conviction is a severity level 7, person felony.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Dodson*, 222 Kan. 519, 565 P.2d 291 (1977), the Court stated that when the offer is implicit in the defendant's words and actions when taken in the context in which they occurred, no overt act is required to complete the offense of solicitation.

64.091

COMMERCIAL SEXUAL EXPLOITATION OF A CHILD

The defendant is charged with commercial sexual exploitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant hired insert initials of child by giving, offering, or agreeing to give, anything of value to any person.
2. The defendant hired insert initials of child to engage in (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the defendant or another) (sexual intercourse) (sodomy) (any unlawful sexual act).

OR

1. The defendant knowingly (established) (participated in the establishment of) (owned) (participated in the ownership of) (maintained) (participated in the maintenance of) (managed) (participated in the management of) real property or personal property where sexual relations with insert initials of child were (sold) (offered for sale).

OR

1. The defendant knowingly permitted any real or personal property (partially owned) (wholly owned) (controlled) by the defendant to be used as a place where sexual relations with insert initials of child were being sold or offered for sale.
2. or 3. At the time of the act, insert initials of child was (less than 14 years old) (less than 18 years old). The State need not prove the defendant knew the child's age.
- [3. or 4. The defendant was 18 or more years old at the time the act occurred.]
4. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6422. With two exceptions, commercial sexual exploitation of a child is a severity level 4, person felony. It is an off-grid, person felony if the defendant was 18 or more years old and the child was less than 14 years old, and it is a level 2, person felony if the defendant has previously been convicted of this crime.

In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 or more years old at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). "Where the defendant's age is an essential element of the crime, the defendant is entitled to have that element included in the jury instruction that enumerates the elements of the crime." The court errs if the question of the defendant's age is submitted to the jury in a special question on the verdict form rather than as one of the elements. *State v. Brown*, 298 Kan. 1040, Syl. ¶ 1, 318 P.3d 1005 (2014).

If there is some evidence that a defendant was not 18 or more years old at the time the sexual intercourse occurred, a lesser included instruction omitting the element regarding the defendant's age should be given.

Proof of a culpable mental state does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged. See K.S.A. 21-5204(b).

64.092

**UNLAWFUL USE OF COMMUNICATION FACILITY
TO PROMOTE SALE OF SEXUAL RELATIONS**

The defendant is charged with the unlawful use of a communication facility to promote the sale of sexual relations. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (intentionally) used a communication facility in (committing) (causing the commission of) (facilitating the commission of) any felony violation of the crime of promoting the sale of sexual relations.

OR

1. The defendant (knowingly) (intentionally) used a communication facility in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) any felony violation of the crime of promoting the sale of sexual relations.
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The elements of the crime of promoting the sale of sexual relations are (set forth in Instruction No. ____) (as follows: _____).

"Communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes telephone, wire, radio, computer networks, beepers, pagers, and all means of communication.

["Attempt" means an overt act toward the perpetration of a crime done by a person who intends to commit the crime, but fails in the perpetration or is prevented or intercepted in executing the crime.]

["Conspiracy" means an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all the facts and circumstances.]

["Solicitation" means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.]

Notes on Use

For authority, see K.S.A. 21-6424(a)(1) and (2), and K.S.A. 21-6420. Violation of this statute is a severity level 7, person felony. K.S.A. 21-6424(b).

The elements of the underlying felony violation alleged under K.S.A. 21-6420 should be set forth in the concluding portion of the instruction.

The definition of "attempt" is derived from K.S.A. 21-5301(a); the definition of "conspiracy" is derived from K.S.A. 21-5302(a); and the definition of "solicitation" is derived from K.S.A. 21-5303(a).

64.093

**UNLAWFUL USE OF COMMUNICATION FACILITY
FOR COMMERCIAL SEXUAL EXPLOITATION OF A CHILD**

The defendant is charged with the unlawful use of a communication facility for the commercial sexual exploitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (knowingly) (intentionally) used a communication facility in (committing) (causing the commission of) (facilitating the commission of) the crime of commercial sexual exploitation of a child.

OR

1. The defendant (knowingly) (intentionally) used a communication facility in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the crime of commercial sexual exploitation of a child.
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The elements of the crime of commercial sexual exploitation of a child are (set forth in Instruction No. _____) (as follows: _____).

"Communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes telephone, wire, radio, computer networks, beepers, pagers, and all means of communication.

["Attempt" means an overt act toward the perpetration of a crime done by a person who intends to commit the crime, but fails in the perpetration or is prevented or intercepted in executing the crime.]

["Conspiracy" means an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all the facts and circumstances.]

["Solicitation" means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.]

Notes on Use

For authority, see K.S.A. 21-6424(a)(1) and (2), and K.S.A. 21-6422. Violation of this statute is a severity level 7, person felony. K.S.A. 21-6424(b).

The elements of the underlying felony violation alleged under K.S.A. 21-6422 should be set forth in the concluding portion of the instruction.

The definition of "attempt" is derived from K.S.A. 21-5301(a); the definition of "conspiracy" is derived from K.S.A. 21-5302(a); and the definition of "solicitation" is derived from K.S.A. 21-5303(a).

64.100

GAMBLING—DEFINITIONS

"Bet" is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.

"Consideration" means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration.

"Gambling device" is any so-called "slot machine" or any other machine, mechanical device, electronic device or other contrivance an essential part of which is a drum or reel with insignia thereon, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may become entitled to receive, as the result of chance, any money or property; any other machine, mechanical device, electronic device or other contrivance (including, but not limited to, roulette wheels and similar devices) which is equipped with or designed to accommodate the addition of a mechanism that enables accumulated credits to be removed, is equipped with or designed to accommodate a mechanism to record the number of credits removed or is otherwise designed, manufactured or altered primarily for use in connection with gambling, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may become entitled to receive, as the result of chance, any money or property; any subassembly or essential part intended to be used in connection with any such machine, mechanical device, electronic device or other contrivance, but which is not attached to any such machine, mechanical device, electronic device or other contrivance as a constituent part; or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device.

"Gambling place" is any place, room, building, vehicle, tent or location which is used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries, or playing gambling devices.

"Lottery" is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance. As used in this definition, a lottery does not include a lottery operated by the State pursuant to the Kansas Lottery Act.

"Tribal gaming" means any gaming conducted pursuant to a tribal-state gaming compact.

"Tribal-state gaming compact" means a compact entered into between the State of Kansas and certain native American tribes with respect to the tribe's authority to engage in gaming on the tribe's reservation property in the State of Kansas.

"Tribal gaming commission" means a commission created by a native American tribe in accordance with a tribal-state gaming compact.

Notes on Use

For authority, see K.S.A. 21-6403 and K.S.A. 74-9801 to 74-9809. This instruction contains the statutory definitions applicable to gambling offenses. All statutory definitions are provided, any of which may be used in an appropriate case.

K.S.A. 21-6403(a)(1), (2), (3), (4), (5), (6) and (7) set forth what a bet does not include. A bet does not include: bona fide business transactions which are valid under the law of contracts including but not limited to contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation for loss caused by the happening of the chance including, but not limited, to contracts of indemnity or guaranty and life or health and accident insurance; offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such a contest; a lottery as defined in this section; any bingo game by or for participants managed, operated or conducted in accordance with the laws of the State of Kansas by an organization licensed by the State of Kansas to manage, operate or conduct games of bingo; a lottery operated by the State pursuant to the Kansas Lottery Act; and any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas Parimutuel Racing Act.

K.S.A. 21-6403(b) states a lottery does not include a lottery operated by the State pursuant to the Kansas Lottery Act.

K.S.A. 21-6403(c) declares that the term "consideration" shall not include sums of money paid by or for participants in any bingo game managed, operated, or conducted in accordance with the laws of the State of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate or conduct bingo games under the laws of the State of Kansas and it shall be conclusively presumed that such sums paid by or for said participants were intended by said participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations; sums of money paid by or for participants in any lottery operated by the State pursuant to the Kansas Lottery Act; sums of money paid by or for participants in any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas

Parimutuel Racing Act; or sums of money paid by or for a person to participate in tribal gaming. Where such excluded transactions are involved in the particular case, they usually raise pure questions of law to be determined by the Court. Hence, the matters excluded have not been set forth directly in the instruction containing gambling definitions. If issues of fact should arise on these matters, an additional appropriate instruction could be given.

Gambling device does not include any machine, mechanical device, electronic device or other contrivance used or for use by a licensee of the Kansas racing and gaming commission as authorized by law and rules and regulations adopted by the commission or by the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission; any machine, mechanical device, electronic device or other contrivance, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (i) which when operated does not deliver, as a result of chance, any money, or (ii) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money; any so-called claw, crane, or digger machine and similar devices which are designed and manufactured primarily for use at carnivals or county or state fairs; or any machine, mechanical device, electronic device or other contrivance used in tribal gaming.

K.S.A. 21-6403(e) provides that evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places, is admissible on the issue of whether it is a gambling place.

Comment

Before July 1, 2011 Revisions to Criminal Code

A television give-away program in which persons were called from the telephone directory and given a prize if they knew a code number and the amount of the jackpot which had been related on a television program does not involve valuable consideration coming directly or indirectly from participants and this is not a "lottery" within the constitutional and statutory provisions. *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, 473 P.2d 97 (1970).

State v. Finney, 254 Kan. 632, 644-55, 867 P.2d 1034 (1994), defines the terms lottery and state-owned lottery as used in Article 15, § 3 of the Kansas Constitution.

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), K.S.A. 79-4701 was construed to bring a class A private club within the definition of a bona fide fraternal organization; thus, making the club eligible for a bingo license.

In *State v. Thirty-six Pinball Machines*, 222 Kan. 416, 565 P.2d 236 (1977), the Court construed the term "gambling devices" in K.S.A. 21-4302(d) and held that a pinball machine which is played by means of a spring-loaded plunger and metallic balls and which "pays off" only in free replays is capable of innocent use and is not a gambling device *per se*. The Court stated that it is the actual use to which a pinball machine is put which determines whether it is possessed and used as a gambling device.

In *Games Management, Inc. v. Owens*, 233 Kan. 444, 662 P.2d 260 (1983), the Court named three requirements for "gambling devices" in K.S.A. 21-4302(d) and held that the video games

known as "Double-Up" and "Twenty-One" which gave only free replays as a prize were not gambling devices. The replays, as they could not be exchanged for money or property, were not considered something of value. The Court did state that the games were games of chance and thus represented gambling devices if something of value were received as a reward for winning.

See also, *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), where the same principle was applied to electronic video card games.

In *Lambeth v. Levens*, 237 Kan. 614, 623, 702 P.2d 320 (1985), K.S.A. 25-3108, providing for breaking a tie vote in an election by lot, was held not a form of an unconstitutional lottery because campaign expenses were not included in the definition of "consideration" contained in K.S.A. 21-4302(c).

K.S.A. 21-4302(e) "contains no requirement that the premises must have been used previously as a gambling place before it is rendered a gambling place. The statute does not expressly require that the place have as 'one of its principal uses' the making and settling of bets." *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

64.110

COMMERCIAL GAMBLING

The defendant is charged with commercial gambling. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly insert one of the following:**
 - (operated) (received all or part of the earnings of) a gambling place.**
 - or**
 - (received, recorded, or forwarded bets or offers to bet) (possessed facilities with intent to receive, record, or forward bets).**
 - or**
 - for gain, became a custodian of anything of value bet or offered to be bet.**
 - or**
 - (conducted a lottery) (possessed facilities with intent to conduct a lottery).**
 - or**
 - (set up for use) (collected the proceeds of) a gambling device.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6406(a)(1). Commercial gambling is a severity level 8, nonperson felony. Appropriate definitions in PIK 4th 64.100, Gambling—Definitions, should be given with this instruction.

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64.120

**PERMITTING PREMISES TO BE USED FOR
COMMERCIAL GAMBLING**

The defendant is charged with permitting premises to be used for commercial gambling. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly insert one of the following:**
 - granted the use or allowed the continued use of a place as a gambling place.**
 - or**
 - permitted another to set up a gambling device for use in a place under the defendant's control.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6406(a)(2). Permitting premises to be used for commercial gambling is a class B nonperson misdemeanor. Appropriate definitions in PIK 4th 64.100, Gambling—Definitions, should be given with this instruction.

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64.130

DEALING IN GAMBLING DEVICES

The defendant is charged with dealing in gambling devices. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (manufactured) (distributed) (possessed with intent to distribute) a gambling device or sub-assembly or essential part thereof.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

["Possession" means having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-6407(a). Dealing in gambling devices is a severity level 8, nonperson felony. Appropriate definitions in PIK 4th 64.100, Gambling—Definitions, should be given with this instruction.

One or more of the alternative ways of committing this crime lacks a required culpable mental state. If applicable, see PIK 4th 52.300, Definition of Crime Does Not Prescribe Culpable Mental State.

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64.140

**DEALING IN GAMBLING DEVICES—INFERENCE
FROM POSSESSION**

If you find the defendant had possession of any device designed exclusively for gambling purposes, which was not set up for use or which was not in a gambling place, you may infer that the defendant had possession with the intent to distribute the same. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-6407(c).

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64.150

DEALING IN GAMBLING DEVICES—DEFENSE

It is a defense to this charge that the gambling device *insert one of the following:*

- is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950.
or
- or sub-assembly or essential part thereof was manufactured, distributed or possessed by a manufacturer registered under federal law or a transporter under contract with such manufacturer with intent to distribute for use *insert one of the following:*
 - by the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission.
 - by a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission.
 - in a state other than the State of Kansas.or
- in tribal gaming.

Notes on Use

For authority, see K.S.A. 21-6407(d). If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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64.160**POSSESSION OF A GAMBLING DEVICE**

The defendant is charged with possession of a gambling device. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant possessed a gambling device.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

"Possession" means having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

Notes on Use

For authority, see K.S.A. 21-6408(a). Possession of a gambling device is a class B, nonperson misdemeanor. Appropriate definitions in PIK 4th 64.100, Gambling—Definitions, should be given with this instruction.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), the State sought to sell or destroy confiscated electronic video card games. The Kansas Supreme Court held the State may not seek sale or destruction of property under K.S.A. 22-2512 without a notice or hearing for those having a property interest in the machines.

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64.170

POSSESSION OF A GAMBLING DEVICE—DEFENSE

It is a defense to this charge that the gambling device is insert one of the following:

- an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950.
- or
- possessed or under custody or control of a manufacturer registered under the federal law or a transporter under contract with such manufacturer with intent to distribute for use insert one of the following:
 - by the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission.
 - by a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission.
 - in a state other than the State of Kansas.
- or
- in tribal gaming.

Notes on Use

For authority, see K.S.A. 21-6408(c). If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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64.180

INSTALLING COMMUNICATION FACILITIES FOR GAMBLERS

The defendant is charged with installing communication facilities for gamblers. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant installed communication facilities in a place known by the defendant to be a gambling place.**

OR

- 1. The defendant installed communication facilities knowing that they would be used principally for the purpose of transmitting information to be used in making or settling bets.**

OR

- 1. The defendant allowed continued use of communication facilities knowing that the facilities were being used principally for the purpose of transmitting information to be used in making or settling bets.**

- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6409(a). Installing communication facilities for gamblers is a severity level 8, nonperson felony. Appropriate definitions in PIK 4th 64.100, Gambling—Definitions, should be given with this instruction.

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64.190

CRUELTY TO ANIMALS

The defendant is charged with cruelty to animals. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant insert one of the following:
 - knowingly and maliciously (killed) (injured) (maimed) (tortured) (burned) (mutilated) a insert kind of animal.
 - or
 - knowingly abandoned a insert kind of animal without making provisions for its proper care.
 - or
 - had physical custody of a insert kind of animal and knowingly failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) (other care) as is needed for the health or well-being of that kind of animal.
 - or
 - intentionally used a (wire) (pole) (stick) (rope) (insert other object) to cause an equine to lose its balance or fall, for the purpose of sport or entertainment.
 - or
 - knowingly but not maliciously (killed) (injured) a insert kind of animal.
 - or
 - knowingly and maliciously administered any poison to any domestic animal.
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

As used in this instruction, the term "equine" means a horse, pony, mule, jenny, donkey, or hinny.

As used in this instruction, the term "maliciously" means a state of mind characterized by actual evil-mindedness or specific intent to do a harmful act without a reasonable justification or excuse.

Notes on Use

For authority, see K.S.A. 21-6412(a). Cruelty to animals as described in the first and last alternatives under Element No. 1 is a nongrid, nonperson felony. The first conviction for a conviction under the remaining alternatives is a class A, nonperson misdemeanor. A second or subsequent conviction is a nongrid, nonperson felony. K.S.A. 21-6411 defines "animal." K.S.A. 47-1701 provides other definitions such as food, water, etc.

Comment

Before July 1, 2011 Revisions to Criminal Code

It was held in *State, ex rel. v. Claiborne*, 211 Kan. 264, 505 P.2d 732 (1973), that cockfighting does not constitute cruelty to animals under the former statute K.S.A. 21-4310.

64.200

CRUELTY TO ANIMALS—DEFENSE

It is a defense to the charge of cruelty to animals that insert any relevant exceptions contained in K.S.A. 21-6412.

Notes on Use

K.S.A. 21-6412(c) provides specific exceptions to the crime of cruelty to animals which may be available as a defense, if relevant. If this instruction is used, PIK 4th 51.050, Defenses—Burden of Proof, should be given.

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64.210

UNLAWFUL CONDUCT OF DOG FIGHTING

The defendant is charged with dog fighting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant insert one of the following:**
 - **caused for (amusement) (gain) a dog to (fight with) (injure) another dog.**
 - or**
 - **knowingly permitted a dog to (fight with) (injure) another dog for (amusement) (gain) on premises under the defendant's (ownership) (charge) (control).**
 - or**
 - **(trained) (owned) (kept) (transported) (sold) any dog with the intent of having it fight with or injure another dog.**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6414(a). Unlawful conduct of dog fighting is a severity level 10, nonperson felony.

See K.S.A. 47-1701(j) for a definition of "dog."

If the crime charged is a violation of subsection (a)(1), the prosecution need not prove culpable mental state.

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64.220**HARMING OR KILLING CERTAIN DOGS**

The defendant is charged with harming or killing a[n] (police dog) (arson dog) (assistance dog) (game warden dog) (search and rescue dog). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly and without lawful cause or justification (poisoned) (inflicted [great bodily harm] [permanent disability] [death]) upon a[n] (police dog) (arson dog) (assistance dog) (game warden dog) (search and rescue dog).**
- 2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-6416. Inflicting harm, disability or death to a police dog, arson dog, assistance dog, game warden dog, or search and rescue dog is a nongrid, nonperson felony. For definitions of the types of dogs referenced above, see K.S.A. 21-6416.

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65.010

RACKETEERING—EXTORTION

The defendant is charged with racketeering. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was (the owner of) (the proprietor of) (a person having a financial interest in) a business.
2. Defendant intentionally and wrongfully (demanded) (solicited) (received) from insert name a thing of value by means of an express or implied (threat) (promise) that the defendant would (cause the competition of insert name to be diminished or eliminated) (cause the price of goods or services [purchased] [sold] in the business of insert name to be increased, decreased, or maintained at a stated level) (protect the [property used in the business of insert name] [person of insert name] [family of insert name] from injury by violence or other unlawful means).
3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6501. Racketeering is a severity level 7, nonperson felony.

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65.020

EQUITY SKIMMING

The defendant is charged with equity skimming. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Defendant, with the intent to defraud, engaged in (a pattern) (the practice) of insert one of the following:
 - (purchasing) (acquiring an interest in) one family to four family dwellings (including condominiums and cooperatives) subject to a loan (in default at the time of purchase) (in default within one year after the purchase) which is secured by a mortgage.
 - or
 - failing to deliver to the (holder of the mortgage) (holder of the certificate of purchase) all rent proceeds received from rental of the property that do not exceed the monthly payment of principal and interest required by the note and mortgage.
 - or
 - (applying) (authorizing the application of) rents from such dwellings for the defendant's own use.
2. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6504. Equity skimming is a class A, nonperson misdemeanor.

The statute provides that each purchase of a dwelling is a separate offense.

For a definition of "intent to defraud," see K.S.A. 21-5111(o).

65.030

COMMERCIAL BRIBERY

The defendant is charged with commercial bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (conferred) (offered or agreed to offer) (solicited) (accepted or agreed to accept) a benefit as consideration for knowingly (violating) (agreeing to violate) a duty of fidelity or trust owed to insert name.
2. Insert name was insert one of the following:
 - an (agent) (employee) of insert name.
 - or
 - a person acting in a fiduciary capacity for insert name.
 - or
 - a (lawyer) (physician) (accountant) (appraiser) (professional advisor) employed by insert name.
 - or
 - (an officer) (a director) (a partner) (a manager) (a participant in the affairs) of insert name, (a corporation) (a partnership) (an unincorporated association).
 - or
 - (an arbitrator) (an adjudicator) (a referee).
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-6506. The statute provides that a person charged under this section may also be prosecuted for theft. Commercial bribery is a severity level 8, nonperson felony.

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65.040

SPORTS BRIBERY

The defendant is charged with sports bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. Insert name was a (sports participant) (sports official).

2. The defendant (conferred) (offered or agreed to confer) a benefit upon insert name with the intent to influence (him) (her) not to give (his) (her) best efforts in a sports contest.

OR

2. The defendant (conferred) (offered or agreed to confer) a benefit upon insert name with the intent to influence (him) (her) to improperly perform (his) (her) duties.

OR

2. Defendant, as a sports participant, (accepted) (agreed to accept) (solicited) a benefit from insert name upon the understanding that defendant would not give (his) (her) best efforts in a sports contest.

OR

2. Defendant (accepted) (agreed to accept) (solicited) a benefit from insert name upon the understanding that defendant would perform (his) (her) duties as a sports official improperly.

3. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Sports contest" means any professional or amateur sports or athletic game or contest viewed by the public.

"Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

"Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-6507, effective July 1, 2011. This statute combines former K.S.A. 21-4406, Sports Bribery and K.S.A. 21-4407, Receiving a Sports Bribe. Sports bribery under the first two alternatives of Element No. 2 is a severity level 9, nonperson felony. Under the second two alternatives, sports bribery is a class A, nonperson misdemeanor.

65.050

TAMPERING WITH A SPORTS CONTEST

The defendant is charged with tampering with a sports contest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (sought to influence insert name, a [sports participant] [sports official]) (tampered with an animal or equipment involved in the conduct or operation of a sports contest in a manner known to be contrary to the rules and usages governing the contest).
2. The defendant did so with the intent to influence the outcome of the contest.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Sports contest" means any professional or amateur sports or athletic game or contest viewed by the public.

"Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

"Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-6508. Tampering with a sports contest is a severity level 9, nonperson felony. The definitions contained in the instruction are the same as those in K.S.A. 21-6507 and as set forth in PIK 4th 65.040, Sports Bribery.

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66.010

**TRAFFIC OFFENSE—DRIVING UNDER THE INFLUENCE
OF ALCOHOL OR DRUGS**

The defendant is charged with (operating) (attempting to operate) a vehicle while under the influence of (alcohol) (a drug) (a combination of drugs) (a combination of alcohol and [any drug] [drugs]). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (operated) (attempted to operate) a vehicle.**
- 2. The defendant, while (operating) (attempting to operate) the vehicle, was under the influence of (alcohol) (a drug) (a combination of drugs) (a combination of alcohol and any drug[s]) to a degree that rendered (him) (her) incapable of safely driving a vehicle.**
- [3. The defendant was 18 or more years old.**
- 4. The defendant had at least one child in the vehicle who was less than 18 years old.]**
- 3. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 8-1567(a)(3), (4), and (5), and K.S.A. 8-1005.

K.S.A. 8-1567(c) provides that a defendant's punishment will be enhanced by one month of imprisonment when the defendant was 18 or more years old and had one or more children who were less than 18 years old in the vehicle at the time of the offense. In such a case the court should give bracketed Element Nos. 3. and 4. If defendant's or child's age is disputed, the court should also instruct the jury on driving under the influence of alcohol as a lesser offense by omitting Element Nos. 3. and 4.

For the definition of "attempt," see PIK 4th 53.010.

A first conviction is a class B misdemeanor. A second conviction is a class A misdemeanor. A third conviction is a nonperson, nongrid felony if the defendant had a prior conviction which occurred within the preceding 10 years. If none of the defendant's prior convictions were within the preceding 10 years, the third conviction is a class A misdemeanor. Fourth or subsequent convictions are nonperson, nongrid felonies.

K.S.A. 8-126 defines "vehicle" generally, as well as a number of types of vehicles specifically.

As to what is a vehicle under similar statutes, see 66 A.L.R. 2d 1146.

It is no defense to this charge that the defendant is or has been entitled to use the drug involved and, when applicable, the jury should be so instructed. K.S.A. 8-1567(d).

Comment

In *State v. Ahrens*, 296 Kan. 151, 290 P.3d 629 (2012) the Supreme Court held that use of the terms "operating" and "attempt to operate" in K.S.A. 8-1567(a) does not create alternative means of violating the statute.

A defendant must drive a vehicle in order to be convicted of operating a vehicle while under the influence [K.S.A. 8-1567(a)]; that is, there must be movement of the vehicle and direct or circumstantial evidence that the defendant drove the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980); *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002). When charged with an *attempted* violation of the same statute, no movement of the vehicle is required. *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002).

Proof of erratic driving is unnecessary for a conviction of driving while under the influence of alcohol. Evidence of incapacity to drive safely can be established through sobriety tests and other means. *State v. Blair*, 26 Kan. App. 2d 7, 974 P.2d 121 (1999).

Reckless driving is not a lesser included offense of DUI. *State v. Mourning*, 233 Kan. 678, 682, 664 P.2d 857 (1983).

The phrase "driving under the influence" is not unconstitutionally vague. *State v. Campbell*, 9 Kan. App. 2d 474, 475, 681 P.2d 679 (1984).

K.S.A. 8-1567(a)(1) is not unconstitutionally vague. *State v. Larson*, 12 Kan. App. 2d 198, 201, 737 P.2d 880 (1987).

A refusal to submit to a breath test is not protected by the Fifth Amendment. *State v. Leroy*, 15 Kan. App. 2d 68, 803 P.2d 577 (1990); *State v. Wahweotten*, 36 Kan. App. 2d 568, 143 P.3d 58 (2006).

Intent is not an element of the crime of driving while under the influence of alcohol or drugs as the legislature intended that the commission of the prohibited act constitutes the crime regardless of intent, knowledge, or ignorance. *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999); *State v. Creamer*, 26 Kan. App. 2d 914, 996 P.2d 339 (2000).

Driving while under the influence of alcohol under certain circumstances is a lesser included offense of involuntary manslaughter where: (1) Driving under the influence is alleged as the underlying misdemeanor in the information or complaint; and (2) all of the elements of driving under the influence are alleged in the information or complaint and are necessarily proved to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, Syl. ¶ 2, 744 P.2d 833 (1987).

A refusal to submit to testing of blood, breath, urine, or other bodily substance may be used at any trial on a charge arising out of the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both. See K.S.A. 8-1001(c)(4).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.C. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

66.020

**TRAFFIC OFFENSE—ALCOHOL
CONCENTRATION .08 OR MORE**

The defendant is charged with (operating) (attempting to operate) a vehicle while the alcohol concentration in (his) (her) blood or breath is .08 or more. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant (operated) (attempted to operate) a vehicle.**
- 2. The defendant, while (operating) (attempting to operate) the vehicle, had an alcohol concentration in (his) (her) blood or breath of .08 or more [as measured within three hours of the time of operating or attempting to operate the vehicle].**
- [3. The defendant was 18 or more years old.**
- 4. The defendant had at least one child in the vehicle who was less than 18 years old.]**
- 3. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

"Alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood) (210 liters of breath).

Notes on Use

For authority, see K.S.A. 8-1567(a)(1) and (2), and K.S.A. 8-1005.

The bracketed clause in Element No. 2 dealing with operating a vehicle within three hours should not be given if the prosecution is pursuant to K.S.A. 8-1567(a)(1).

For the definition of "attempt," see PIK 4th 53.010.

K.S.A. 8-1567(c) provides that a defendant's punishment will be enhanced by one month of imprisonment when the defendant was 18 or more years old and had one or more children under the age of 18 in the vehicle at the time of the offense. In such a case, the court should give bracketed Element Nos. 3 and 4. If defendant's or child's age is disputed, the court should also instruct the jury on driving under the influence of alcohol as a lesser offense by omitting Element Nos. 3 and 4.

A first conviction is a class B misdemeanor. A second conviction is a class A misdemeanor. A third conviction is a nonperson, nongrid felony if the defendant had a prior conviction which occurred within the preceding 10 years. If none of the defendant's prior convictions were within the preceding 10 years, the third conviction is a class A misdemeanor. Fourth or subsequent convictions are nonperson, nongrid felonies.

Comment

In *State v. Ahrens*, 296 Kan. 151, 290 P.3d 629 (2012), the Supreme Court held that use of the terms "operate" and "attempt to operate" in K.S.A. 8-1657(a) does not create alternative means of violating the statute.

Definition of alcohol concentration in K.S.A. 8-1005 is applicable to a city ordinance. *City of Ottawa v. Brown*, 11 Kan. App. 2d 581, 584-585, 730 P.2d 364 (1986), *rev. denied* 241 Kan. 838 (1987).

A defendant must drive a vehicle in order to be convicted of operating a vehicle while under the influence [K.S.A. 8-1567(a)]; that is, there must be movement of the vehicle and direct or circumstantial evidence that the defendant drove the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980); *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002). When charged with an *attempted* violation of the same statute, no movement of the vehicle is required. *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002).

To obtain a conviction for a per se violation under K.S.A. 8-1567(a)(2), the State must show the alcohol concentration was tested *within* two hours of the last time a defendant operated or attempted to operate a motor vehicle. *State v. Pendleton*, 18 Kan. App. 2d 179, 849 P.2d 143 (1993). However, the result of any alcohol concentration test performed more than two hours after the defendant last operated or attempted to operate a motor vehicle is admissible as "other competent evidence" if the prosecution is pursuant to K.S.A. 8-1567(a)(1). *State v. Silva*, 25 Kan. App. 2d 437, 962 P.2d 1146 (1998).

Intent is not an element of the crime of driving while under the influence of alcohol or drugs as the legislature intended that the commission of the prohibited act constitutes the crime regardless of intent, knowledge, or ignorance. *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999); *State v. Creamer*, 26 Kan. App. 2d 914, 996 P.2d 339 (2000).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.C. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

66.021

**TRAFFIC OFFENSE—ALCOHOL CONCENTRATION
.04 OR MORE WHILE OPERATING
A COMMERCIAL MOTOR VEHICLE**

The defendant is charged with (operating) (attempting to operate) a commercial motor vehicle while the alcohol concentration in (his) (her) blood or breath is .04 or more. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (operated) (attempted to operate) a commercial motor vehicle.
2. The defendant, while (operating) (attempting to operate) the vehicle, had an alcohol concentration in (his) (her) blood or breath of .04 or more [as measured within three hours of the time of operating or attempting to operate the vehicle].
- [3. The defendant was 18 or more years old.
4. The defendant had at least one child in the vehicle who was less than 18 years old.]
3. or 5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood) (210 liters of breath).

"Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property if insert the appropriate portion of the definition found in K.S.A. 8-2,128(f).

Notes on Use

For authority, see K.S.A. 8-2,144(a)(1) and (2). A first conviction is a class B, nonperson misdemeanor. A second conviction is a class A, nonperson misdemeanor. A third or subsequent conviction is a nonperson, nongrid felony.

The bracketed clause in Element 2 dealing with operating a vehicle within three hours should not be given if the prosecution is based on "other competent evidence" as defined in K.S.A. 8-1013(f).

K.S.A. 8-2,144(c) provides that a defendant's punishment will be enhanced by one month of imprisonment when the defendant was 18 or more years old and had one or more children under the age of 18 in the vehicle at the time of the offense. In such a case, the court should give bracketed Element Nos. 3. and 4. If defendant's or child's age is disputed, the court should also instruct the jury on driving under the influence of alcohol as a lesser offense by omitting Element Nos. 3. and 4.

66.022

TRAFFIC OFFENSE—OPERATING A COMMERCIAL MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

The defendant is charged with (operating) (attempting to operate) a commercial motor vehicle while under the influence of (alcohol) (a drug) (a combination of alcohol and [any drug] [drugs]). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant (operated) (attempted to operate) a commercial motor vehicle.
2. The defendant, while (operating) (attempting to operate) the vehicle, was under the influence of (alcohol) (a drug) (a combination of drugs) (a combination of alcohol and [any drug] [drugs]) to a degree that rendered (him) (her) incapable of safely driving a vehicle.
- [3. The defendant was 18 or more years old.
4. The defendant had at least one child in the vehicle who was less than 18 years old.]
3. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

"Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property if insert the appropriate portion of the definition found in K.S.A. 8-2,128(f).

Notes on Use

For authority, see K.S.A. 8-2,144(a)(3).

A first conviction is a class B, nonperson misdemeanor. A second conviction is a class A, nonperson misdemeanor. A third or subsequent conviction is a nonperson, nongrid felony.

K.S.A. 8-2,144(c) provides that a defendant's punishment will be enhanced by one month of imprisonment when the defendant was 18 or more years old and had one or more children under the age of 18 in the vehicle at the time of the offense. In such a case, the court should give bracketed Element Nos. 3. and 4. If defendant's or child's age is disputed, the court should also instruct the jury on driving under the influence of alcohol as a lesser offense by omitting Element Nos. 3. and 4.

66.030**DUI CHARGED IN THE ALTERNATIVE**

The defendant is charged in the alternative with:

Insert applicable DUI alternative.

OR

Insert applicable DUI alternative.

You are instructed that the alternative charges constitute one crime.

You should consider if the defendant is guilty of insert the first alternative DUI charge and sign the verdict upon which you agree.

You should further consider if the defendant is guilty of insert the second alternative DUI charge and sign the verdict upon which you agree.

Notes on Use

This instruction should be given when the State charges a DUI offense in the alternative. See PIK 4th 66.010, Traffic Offense—Driving Under the Influence of Alcohol or Drugs, and PIK 4th 66.020, Traffic Offense—Alcohol Concentration .08 or More.

A modified version of this instruction should be given in a commercial vehicle DUI case charged in the alternative.

Authority for instructions in the alternative are found in *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978), and *State v. McCowan*, 226 Kan. 752, 764, 602 P.2d 1363 (1979), *cert. denied*, 449 U.S. 844, 101 S. Ct. 127, 66 L. Ed. 2d 53 (1980).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.C. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

66.040

**DRIVING UNDER THE INFLUENCE—IF
CHEMICAL TEST USED**

[If a (blood) (breath) (urine) (other bodily substance) test shows the defendant had a (blood) (breath) alcohol concentration level of .08 percent or more, you may assume the defendant was under the influence of alcohol to a degree that (he) (she) was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case.]

[If a (blood) (breath) (urine) (other bodily substance) test shows the defendant had a (blood) (breath) alcohol concentration level of less than .08 percent, you may consider that fact along with other competent evidence to determine whether the defendant was under the influence of (alcohol) (a combination of alcohol and [any drug] [drugs]) to a degree that (he) (she) was rendered incapable of driving safely.]

[If a test of the defendant's bodily substance shows the presence of a narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapable of safely driving a vehicle, you may consider that fact along with other competent evidence to determine whether the defendant was under the influence of (drugs) (a combination of alcohol and [any drug] [drugs]) to a degree that (he) (she) was rendered incapable of driving safely.]

You are further instructed that evidence derived from a (blood) (breath) (urine) (other body substance) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and [any drug] [drugs]).

Notes on Use

For authority, see K.S.A. 8-1005 and K.S.A. 8-1006. This instruction is to be used in conjunction with PIK 4th 66.010 when chemical tests have been administered. Only the applicable bracketed paragraphs should be used. This instruction is not applicable to a charge or alternative charge of a per se violation of K.S.A. 8-1567(a)(2).

Comment

The constitutionality of a presumption is discussed in the Comment to PIK 4th 58.090, Statutory Inference of Intent to Deprive.

The Committee believes that "prima facie" evidence as used in K.S.A. 8-1005(b) creates a presumption, and the first paragraph of the instruction is worded accordingly. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973).

An earlier version of this instruction was approved in *State v. Price*, 233 Kan. 706, 711, 664 P.2d 869 (1983).

66.041

REFUSING TO SUBMIT TO TESTING

Comment

This instruction has been deleted. The Kansas Supreme Court in *State v. Ryce*, 306 Kan. 682, 396 P.3d 711 (2017) (*Ryce II*), held that K.S.A. 8-1025, on which this instruction was based, was facially unconstitutional. K.S.A. 8-1025 was subsequently repealed.

66.050

**TRANSPORTING AN ALCOHOLIC BEVERAGE IN AN
OPENED CONTAINER**

The defendant is charged with transporting an alcoholic beverage in an opened container. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant transported a container of alcoholic beverage in a vehicle upon a highway or street.**
- 2. The container had been opened.**
- 3. The container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion.**
- 4. The defendant knew or had reasonable cause to know (he) (she) was transporting an opened container of alcoholic beverage.**
- 5. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 8-1599. Transportation of liquor in an open container is a traffic misdemeanor punishable by a fine of not more than \$200, or by imprisonment for not more than six months, or both. K.S.A. 8-1599(c). For a second or subsequent conviction, the court shall suspend the person's driving license or privilege to operate a motor vehicle for one year or in the alternative may enter an order which places restrictions upon the person's driving privileges. K.S.A. 8-1599(d) and (g).

Alcoholic beverage is defined in K.S.A. 8-1599(a) to mean any alcoholic liquor, as defined by K.S.A. 41-102 or any cereal malt beverage, as defined in K.S.A. 41-2701.

Highway and street are defined in K.S.A. 8-1424 and K.S.A. 8-1473.

K.S.A. 8-1599(h) provides it shall be an affirmative defense to any prosecution under this section that an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic liquor.

Comment

In *State v. Stevenson*, 299 Kan. 53, 321 P.3d 754 (2014), the Supreme Court held that operating a vehicle in which alcohol has previously spilled does not, without more, establish the traffic offense of unlawfully transporting an open container of alcohol.

In *State v. Erbacher*, 8 Kan. App. 2d 169, 651 P.2d 973 (1982), the Court of Appeals held that former K.S.A. 41-2719, which prohibits transportation of an open container of cereal malt beverage in a vehicle, applied to passengers as well as to the driver of the vehicle. The Court of Appeals reached a similar conclusion in *State v. Bishop*, 14 Kan. App. 2d 223, 786 P.2d 1152 (1990), holding that former K.S.A. 41-804, that prohibited the transportation of open containers of alcoholic liquor, also applied to passengers as well as the driver of the vehicle. *Bishop* further holds that the State must prove the defendant knew or had reasonable cause to know that open containers of alcoholic liquor were present and being transported, and that the doctrine of constructive possession does not extend to unknowing passengers.

66.060

RECKLESS DRIVING

The defendant is charged with reckless driving. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was driving a vehicle.**
- 2. The defendant was driving in a reckless manner.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

"Reckless" means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger.

Notes on Use

For authority, see K.S.A. 8-1566. A first conviction of reckless driving shall be punishable by imprisonment for not less than five days nor more than 90 days, or by a fine of not less than \$25 nor more than \$500, or by both such fine and imprisonment. Second and subsequent convictions of reckless driving shall be punishable by imprisonment for not less than 10 days nor more than six months, or by a fine of not less than \$50 nor more than \$500, or by both such fine and imprisonment.

Comment

Reckless driving is not a lesser included offense of driving under the influence of alcohol or drugs. *State v. Mourning*, 233 Kan. 678, 664 P.2d 857 (1983); *State v. Brueninger*, 238 Kan. 429, 434-435, 710 P.2d 1325 (1985).

Conviction of a law enforcement officer for reckless driving while on duty affirmed. Conduct not privileged under K.S.A. 8-1506. *State v. Simpson*, 11 Kan. App. 2d 666, 732 P.2d 788 (1987).

In *State v. Remmers*, 278 Kan. 598, 102 P.3d 433 (2004), the Supreme Court held that reckless driving requires more than ordinary inattentive driving.

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66.070

VIOLATION OF CITY ORDINANCE

The ordinance of the City of _____, Kansas, makes it unlawful for any person to state offense charged within the city. The defendant is charged with violating this ordinance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. List the various elements of the offense.
- 2.
- 3.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

The elements of the applicable substantive crime should be set forth in the concluding portion of the instruction.

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66.080**OPERATING AN AIRCRAFT WHILE UNDER THE INFLUENCE
OF INTOXICATING LIQUOR OR DRUGS**

The defendant is charged with operating an aircraft while under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant was operating an aircraft.**
- 2. The defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug), and the control of (his) (her) mental or physical functions was thereby impaired to the extent that the defendant was incapable of safely operating an aircraft.**

OR

- 2. The defendant had .10 percent or more by weight of alcohol in (his) (her) blood as shown by chemical analysis of (his) (her) blood, breath or urine.**
- 3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 3-1001 and K.S.A. 3-1002. A first conviction of this offense is punishable by imprisonment of not more than one year, or by a fine of not less than \$100 nor more than \$500, or by both such fine and imprisonment. Second and subsequent convictions shall be punishable by imprisonment for not less than 30 days nor more than one year, and, in the discretion of the Court, a fine of not more than \$500. K.S.A. 3-1003. In addition, pursuant to K.S.A. 3-1003(b), the Court may order the defendant not to operate an aircraft for any purpose.

If the blood alcohol level is .10 percent or more, the element of "under the influence of intoxicating liquor" is satisfied.

Comment

It is no defense to this charge that the defendant is or has been entitled to use the drug involved and when applicable the jury should be so instructed. K.S.A. 3-1003.

66.090

**OPERATING AN AIRCRAFT WHILE UNDER THE
INFLUENCE—IF CHEMICAL TEST IS USED**

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) may be taken to determine the amount of alcohol in the defendant's blood at the time the alleged offense occurred. If the test shows there was less than .10 percent by weight of alcohol in the defendant's blood, it shall be presumed the defendant was not under the influence of intoxicating liquor.

You are further instructed that evidence derived from a (blood) (breath) (urine) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The evidence established by the test is not conclusive, but it should be considered by you along with all the other evidence in this case.

Notes on Use

For authority, see K.S.A. 3-1004 and K.S.A. 3-1005.

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66.100

IGNITION INTERLOCK DEVICE VIOLATION

The defendant is charged with an ignition interlock device violation.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant tampered with an ignition interlock device for the purpose of circumventing it or rendering it inaccurate or inoperative.

OR

1. The defendant requested or solicited insert name to blow into an ignition interlock device, or to start a motor vehicle equipped with such a device, for the purpose of providing an operable motor vehicle to insert name, a person whose driving privileges had been restricted to driving a motor vehicle equipped with such a device.

OR

1. The defendant blew into or started a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to insert name, a person whose driving privileges had been restricted to driving a motor vehicle equipped with such a device.

OR

1. The defendant operated a motor vehicle not equipped with an ignition interlock device during a period in which (his) (her) driving privileges were restricted to driving a motor vehicle equipped with such a device.
2. The defendant did so intentionally.
3. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

"Ignition interlock device" means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such a person has consumed an alcoholic beverage.

Notes on Use

For authority, see K.S.A. 8-1017. Violation of this section is a class A, nonperson misdemeanor.

Ignition interlock device is defined in K.S.A. 8-1013(d). See also K.S.A. 8-1015 which sets forth the authorized restrictions of driving privileges and how they are imposed.

66.110

FLEEING OR ATTEMPTING TO ELUDE A POLICE OFFICER

The defendant is charged with fleeing or attempting to elude a police officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant was driving a motor vehicle.
2. The defendant was given a visual or audible signal by a police officer to bring the motor vehicle to a stop.
3. The defendant willfully failed or refused to bring the motor vehicle to a stop for, or otherwise fled or attempted to elude, a pursuing police (vehicle) (bicycle).
4. The police officer's (vehicle) (bicycle), from which the signal to stop was given, was appropriately marked showing it to be an official police (vehicle) (bicycle).

OR

4. The police officer, when giving the signal, was in uniform, prominently displaying the officer's badge of office.
- [5. The defendant (failed to stop at a police road block) (drove around a tire deflating device placed by a police officer) (engaged in reckless driving) (was involved in a motor vehicle accident) (intentionally caused damage to property) (committed five or more moving violations) (attempted to elude capture for any felony).]
5. or 6. This act occurred on or about the _____ day of _____, in _____ County, Kansas.

[The elements of _____ are (set forth in instruction no. ____) (as follows: _____).]

Notes on Use

For authority see K.S.A. 8-1568. A first conviction of subsection (a) is a class B nonperson misdemeanor. A second conviction of subsection (a) is a class A nonperson misdemeanor. A third or subsequent conviction of subsection (a) is a severity level 9, person felony. A conviction of subsection (b) is a severity level 9, person felony.

Under circumstances where "reckless driving" should be defined see K.S.A. 8-1566.

Where necessary the intended felony should be referred to or set forth in the concluding portion of the instruction.

In a case in which a defendant is not pursued, but instead fails to stop in response to an order to do so in violation of K.S.A. 8-1568(b)(2), all language following the word "stop" in Element No. 3 should be omitted.

It is an affirmative defense to a violation of K.S.A. 8-1568(a)(1) that the driver's conduct was caused by a reasonable belief that the pursuing vehicle or bicycle was not a police vehicle or bicycle. K.S.A. 8-1568(a)(3).

Comment

In *State v. Richardson*, 290 Kan. 176, 224 P.3d 553 (2010), the Supreme Court held that in a prosecution for felony fleeing or attempting to elude a police officer based on five or more moving violations, the district court must instruct the jury on the specific moving violations and the definitions of those moving violations.

Disobeying a command to stop given by a uniformed law enforcement officer who is on foot does not constitute the crime of fleeing or attempting to elude. An essential element of the crime requires that the uniformed law enforcement officer must be occupying an appropriately marked police vehicle or police bicycle when the visual or audible signal to stop is given to the defendant. *State v. Beeney*, 34 Kan. App. 2d 77, 114 P.3d 996 (2005).

The defendant's reason for fleeing is irrelevant in determining whether to classify the offense as a felony or misdemeanor under K.S.A. 8-1568(b)(2). Only the officer's reason for attempting to capture the defendant is relevant in classifying the offense. *State v. Carter*, 30 Kan. App. 2d 1247, 57 P.3d 825 (2002).

66.111

**TRAFFIC OFFENSE—LEAVING THE SCENE OF AN ACCIDENT
INVOLVING INJURY, DEATH, OR DAMAGE TO PROPERTY**

The defendant is charged with leaving the scene of an accident resulting in injury, death, or damage to property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant was the driver of a vehicle involved in an accident.
2. The accident resulted in select any of the following that apply:
 - injury to a person.
or
 - great bodily harm to a person.
or
 - death of a person.
or
 - damage of under \$1,000 to an attended vehicle or property.
or
 - damage of \$1,000 or more to an attended vehicle or property.
3. The defendant failed (to immediately stop at the scene of the accident and remain) (to stop as close to the scene of the accident as possible and then immediately return to the scene and remain) until information required by law was reported to select any of the following that apply:
 - a law enforcement officer (at the scene of) (who is investigating) the accident.
or
 - any person injured in the accident.
or
 - (the driver of) (an occupant of) (a person attending) any (vehicle) (property) damaged in the accident.

- [4. **The defendant knew or reasonably should have known that the accident resulted in injury or death.]**
- 4. or 5. This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 8-1602 and 8-1604.

Leaving the scene of an accident involving property damages less than \$1,000 is a class C misdemeanor. When the property damage is \$1,000 or more or there has been injury to a person, leaving the scene of an accident is a class A misdemeanor. Leaving the scene of an accident which results in great bodily harm is a severity level 8, person felony. It is a level 6, person felony if the accident results in death of a person, unless the driver knew or reasonably should have known that the accident resulted in injury or death, in which case it is a level 5, person felony.

There is no statutory definition of "great bodily harm," but see, e.g., *State v. Whitaker*, 260 Kan. 85, 917 P.2d 859 (1996). See also the Comment to PIK 4th 54.310, Aggravated Battery.

66.120

**DRIVING WHILE LICENSE IS CANCELED, SUSPENDED,
REVOKED, OR WHILE HABITUAL VIOLATOR**

The defendant is charged with driving a motor vehicle while the defendant's driving privileges were (canceled) (suspended) (revoked) (revoked because the division of motor vehicles determined the defendant to be an habitual violator). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. The defendant drove a motor vehicle on a highway.
2. The defendant's driving privileges were (canceled) (suspended) (revoked) by the division of motor vehicles.

OR

2. The defendant's privilege to obtain a driver's license was suspended or revoked.

OR

2. The division of motor vehicles had determined the defendant to be an habitual violator and had revoked the defendant's driving privileges.
3. The defendant had knowledge that (his) (her) driving privileges had been (canceled) (suspended) (revoked) by the division of motor vehicles.

OR

3. The defendant had knowledge of (his) (her) status as an habitual violator.
4. This act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

As used in this instruction, "highway" means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

As used in this instruction, proof of "knowledge" may be evidence of actual knowledge or by circumstantial evidence indicating a deliberate ignorance on the part of insert name.

Knowledge can be, but is not required to be, inferred from the fact that notification [that insert name's driving privileges had been (canceled) (suspended)] [of insert name's status as an habitual violator] was mailed to insert name at insert name's last known official address.

Notes on Use

For authority, see K.S.A. 8-262 *et seq.* (driving while canceled, suspended or revoked) and K.S.A. 8-285 *et seq.* (driving while an habitual violator).

Driving after being determined an habitual violator is a class A nonperson misdemeanor. A first conviction for driving while canceled, suspended or revoked is a class B nonperson misdemeanor, subsequent convictions are class A nonperson misdemeanors.

For the definitions of cancellation see K.S.A. 8-1408, highway see K.S.A. 8-1424, suspension see K.S.A. 8-1474, and revocation see K.S.A. 8-1457.

Comment

In *State v. Sanchez*, 48 Kan. App. 2d 608, 296 P.3d 1133, *rev. denied* 298 Kan. 1207 (2013), the Court of Appeals held that a passenger with a suspended license who has exerted actual physical control of a vehicle may be convicted of driving with a suspended license.

In *State v. Suter*, 296 Kan. 137, 290 P.3d 620 (2012), the Kansas Supreme Court held that "canceled, suspended or revoked" as used in K.S.A. 8-262 does not create alternative means of violating the statute.

K.S.A. 8-287 specifies that an habitual violator may only violate the statute by operating a motor vehicle, unlike our driving while intoxicated statute (K.S.A. 8-1567). The driving while an habitual violator statute does not criminalize attempting to operate a motor vehicle. *State v. Thomas*, 28 Kan. App. 2d 655, 20 P.3d 82 (2001). The *Thomas* opinion further provides that an individual "operates a motor vehicle" when he or she puts a self-propelled device, other than a motorized bicycle or a motorized wheelchair, into motion on a public thoroughfare by coasting.

K.S.A. 8-262 was amended in 2001 to prohibit individuals from driving during that period of time when their privilege to obtain a driver's license has been suspended or revoked.

In *State v. Lewis* 263 Kan. 843, 953 P.2d 1016 (1998), the Supreme Court held that an individual's knowledge of his or her status as a habitual violator is a required element of the crime of driving while a habitual violator.

66.130

**DEFENSE TO DRIVING WHILE LICENSE IS
CANCELED, SUSPENDED OR REVOKED**

**It is a defense if at the time of arrest the defendant was entitled to the
return of his or her driver's license.**

Notes on Use

For authority, see K.S.A. 8-262(a)(2).

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67.010

**UPWARD DURATIONAL DEPARTURE—SENTENCING
PROCEEDING**

A separate sentencing proceeding is required when a defendant has been found guilty of a crime and the State seeks an increase in the defendant's sentence above the presumptive sentence provided by law. At the proceeding, the trial jury shall consider aggravating factors relevant to the question of the sentence.

The State contends that the following aggravating factors exist in this case:

[List aggravating factors set forth in the State's written notice.]

Notes on Use

For authority, see K.S.A. 21-6815, 21-6816, and 21-6817. This instruction should be given in all upward durational departure hearings to guide deliberations on the existence of aggravating factors. It is the trial court's responsibility to determine whether aggravating factors are substantial and compelling reasons to depart as a matter of law.

This instruction may be preceded by the applicable introductory and cautionary instructions contained in PIK 4th 50.040, 50.050, 50.060, and 50.070, as modified to fit this proceeding.

In *State v. McClennon*, 273 Kan. 562, 45 P.3d 848 (2002), the Kansas Supreme Court noted that under K.S.A. 2001 Supp. 21-4716(b)(3) [21-6815(b)(3)], if a factual aspect of a crime is a statutory element of the crime, that aspect of the current crime of conviction may be used as an aggravating factor for sentencing purposes only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by that aspect of the crime. This subsection applies to all aggravating factors. If the trial court is instructing a jury on an aggravating factor that is also an element of the crime of conviction, the court should instruct the jury that the aggravating factor found to exist must be "significantly different" than the usual criminal conduct involved in such an act. The Committee has prepared no pattern instruction since the language would necessarily be fact-specific for each case.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Duncan*, 291 Kan. 467, 243 P.3d 338, Syl. ¶ 2 (2010), the court held a plea agreement provision for an upward departure sentence and the waivers to the district court at the plea hearing were insufficient because they did not specifically acknowledge and waive the right to a jury determination on upward departure factors. "To be constitutionally valid, a defendant's waiver of his or her right to a jury in an upward durational departure sentence proceeding must be a voluntary, knowing, and intelligent act performed with sufficient knowledge of the relevant circumstances and likely consequences. A guilty or nolo contendere plea to a criminal offense, standing alone, does not constitute a voluntary, knowing, and intelligent waiver of the right to a jury for an upward durational departure sentence proceeding."

In *State v. Kessler*, 276 Kan. 202, 73 P.3d 761 (2003), the court vacated an upward durational departure sentence imposed by the trial court. The case was tried in district court shortly after the Kansas statutes for imposing upward departure sentences were declared unconstitutional in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), but prior to the legislature amending the statutes to address the constitutional concerns. In *Kessler*, although the trial court conducted a separate hearing to obtain a jury determination of aggravating factors beyond a reasonable doubt, the court vacated the upward durational departure sentence on the basis that, at the time of trial, there was no statutory authority for the trial court's procedure.

67.020

BURDEN OF PROOF

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating factors. In deciding whether the State has met its burden, you may consider all the evidence presented at the trial [and the additional evidence presented at this hearing].

Notes on Use

For authority, see K.S.A. 21-6817. This instruction should be given in all upward durational departure hearings. The bracketed language should be included if the parties offered additional evidence after the trial on the existence of aggravating factors.

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67.030

UNANIMOUS VERDICT

The jury must unanimously agree as to each finding of an aggravating factor. If you find beyond a reasonable doubt that there are one or more aggravating factors, you must designate upon the verdict form with particularity the aggravating factors unanimously agreed upon by the jury.

If you are unable to agree that any aggravating factors exist, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict on any aggravating factors.

Notes on Use

For authority, see K.S.A. 21-6817. This instruction should be given in all upward durational departure hearings.

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67.040

EFFECT ON SENTENCE

If you unanimously find beyond a reasonable doubt that there are one or more aggravating factors, then the Court may increase the defendant's sentence above the presumptive sentence provided by law. The length of the defendant's sentence, including any increase due to the existence of aggravating factors, is a matter for determination by the Court.

If you are unable to agree that any aggravating factors exist, then the defendant will receive the presumptive sentence provided by law.

Notes on Use

For authority, see K.S.A. 21-6817. This instruction should be given in all upward durational departure hearings.

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67.050

CONCLUDING INSTRUCTION

Your presiding juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in court and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.

Your agreement upon a verdict finding any aggravating factors must be unanimous.

District Judge

Date

Notes on Use

For authority, see K.S.A. 21-6817. This instruction should be given in all upward durational departure hearings.

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67.060**VERDICT FORM FINDING AGGRAVATING FACTOR(S)****SENTENCING VERDICT**

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following aggravating factors have been established by the evidence. [The presiding juror shall place an X in the square in front of such aggravating factor(s).]

☐ **[factor]**

☐ **[factor]**

☐ **[etc.]**

Presiding Juror

Date of Verdict

Notes on Use

For authority, see K.S.A. 21-6817. The applicable aggravating factors as set forth in the instructions should be included in the verdict form.

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67.070

VERDICT FORM FOR SENTENCE AS PROVIDED BY LAW

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, state that we are unable to reach a unanimous verdict on any aggravating factors.

Presiding Juror

Date of Verdict

Notes on Use

For authority, see K.S.A. 21-6817. If, after a reasonable time for deliberation, the jury is unable to reach a verdict finding any specific factors, the court shall dismiss the jury whether or not this verdict form is signed. In this case, the court shall only impose a sentence as provided by law.

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68.010

CONCLUDING INSTRUCTION

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____.

Notes on Use

For authority, see K.S.A. 22-3421. Absent special circumstances, this concluding instruction should be used in every criminal trial.

Comment

Before July 1, 2011 Revisions to Criminal Code

"The authority for this instruction is based on the fundamental right of any accused to a trial by jury, §§ 5 and 10 of the Kansas Constitution Bill of Rights, and K.S.A. 22-3403, together with our statute requiring a unanimous verdict under K.S.A. 22-3421." *State v. Cheek*, 262 Kan. 91, 108, 936 P.2d 749 (1997).

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68.020

**CONCLUDING INSTRUCTION—CAPITAL MURDER—
SENTENCING PROCEEDING**

Your Presiding Juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in Court and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.

Your agreement upon a verdict sentencing the defendant to death must be unanimous.

District Judge

_____, ____.

Notes on Use

For authority, see K.S.A. 21-6617(b) which provides in part that ". . . The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable." See also *State v. Kleypas*, 272 Kan. 894, 1060-64, 40 P.3d 139 (2001).

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68.030

GUILTY VERDICT—GENERAL FORM

We, the jury, find the defendant guilty of insert offense.

Presiding Juror

Notes on Use

The form should be completed by the court by specifying the particular offense with which defendant is charged. If two or more defendants are tried jointly, separate verdict forms must be provided by adding the name of each defendant to the form. For forms for separate counts, see PIK 4th 68.070, Multiple Counts—Verdict Forms. For forms for lesser included offenses, see PIK 4th 68.110, Lesser Included Offenses —Verdict Forms.

K.S.A. 22-3421 provides that the verdict shall be written, signed by the presiding juror, and read by the clerk, and inquiry made as to whether it is their verdict. If the verdict is defective in form only, it may be corrected by the court with the assent of the jury.

Comment

Before July 1, 2011 Revisions to Criminal Code

A typewritten verdict form which merely requires that it be signed and dated by the presiding juror must conform to the evidence and the offense charged. *State v. Cox*, 188 Kan. 500, 363 P.2d 528 (1961).

If a verdict is not in proper form when returned by the jury, the Court may direct the jury to correct the verdict and may send them back to the jury room for that purpose. *State v. Carrithers*, 79 Kan. 401, 99 Pac. 614 (1909).

In *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973), the Supreme Court considered the question of whether or not special questions could be submitted to the jury in a criminal case. The Court held that in view of the differences in our civil and criminal statutes relating to verdicts, it is apparent that the Legislature intended to preserve the power of a jury to return a verdict in a criminal prosecution in the teeth of the law and the facts. The case held that special questions may not be submitted to the jury in a criminal prosecution. The only proper verdicts are "guilty" or "not guilty" of the charges.

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 64, 785 P.2d 963 (1990), that "[w]hen an accused

is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilty based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose.' " To the same effect, see *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); and *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989).

68.040

NOT GUILTY VERDICT—GENERAL FORM

We, the jury, find the defendant not guilty of _____.

Presiding Juror

Notes on Use

See Notes on Use and Comment to PIK 4th 68.030, Guilty Verdict—General Form.

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68.050

**DEFENSE OF LACK OF CULPABLE MENTAL
STATE—VERDICT FORM**

We, the jury, find the defendant guilty of insert offense.

Presiding Juror

We, the jury, find the defendant not guilty of insert offense.

Presiding Juror

We, the jury, find the defendant not guilty of insert offense solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required culpable mental state.

Presiding Juror

Notes on Use

For authority, see K.S.A. 22-3221.

Comment

The Committee has deleted the words "criminal intent" from the special question suggested in K.S.A. 22-3221. That phrase has been replaced in the revised criminal code with "culpable mental state."

Before July 1, 2011 Revisions to Criminal Code

Mental competency at the time of the commission of an offense – if raised – is to be determined by the trier of facts upon a trial. Mental competency to stand trial – if raised – is another matter and is to be determined by the Court under K.S.A. 22-3302. *Nall v. State*, 204 Kan. 636, 638, 465 P.2d 957 (1970).

A jury instruction on diminished capacity is not required. See *State v. Wilburn*, 249 Kan. 678, 822 P.2d 609 (1991).

This verdict form was cited with approval in *State v. Hunter*, 41 Kan. App. 2d 507, 518, 203 P.3d 23 (2009).

68.060

MULTIPLE COUNTS—VERDICT INSTRUCTION

Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding Juror.

Notes on Use

This instruction should be given when multiple counts are charged.

See PIK 4th 68.070, Multiple Counts—Verdict Forms.

Comment

Before July 1, 2011 Revisions to Criminal Code

PIK 68.07 was cited with approval in *State v. Cameron & Bentley*, 216 Kan. 644, 533 P.2d 1255 (1975).

The trial court erred in failing to give this pattern in *State v. Macomber*, 244 Kan. 396, 405-406, 769 P.2d 621, *cert. denied*, 493 U.S. 842, 110 S. Ct. 130, 107 L. Ed. 2d 90 (1989), *overruled on other grounds by State v. Rinck*, 260 Kan. 634, 923 P.2d 67 (1996). However, the failure was not reversible error under the circumstances of the case because it did not prejudicially affect the substantial rights of the defendant.

In *Macomber*, the Court stated that "[a] trial court does not have the time to give the thought and do the research which has been put into the preparation of the pattern Criminal Jury Instructions by the Advisory Committee on Criminal Jury Instructions to the Kansas Judicial Council. Therefore, where 'pattern jury instructions are appropriate, a trial court should use them unless there is some compelling and articulable reason not to do so.'" *State v. Macomber*, 244 Kan. at 405. See also *State v. Wilson*, 240 Kan. 606, 610, 731 P.2d 306 (1987).

The trial court's failure to give PIK Crim. 3d 68.07 is not clearly erroneous where there is no real possibility that the jury would have reached a different result had the instruction been given. *State v. Gould*, 271 Kan. 394, 401, 23 P.3d 801 (2001).

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68.070

MULTIPLE COUNTS—VERDICT FORMS

1. **We, the jury, find the defendant guilty of (... crime charged Count 1 ...).**

Presiding Juror

We, the jury, find the defendant not guilty of (... crime charged Count 1 ...).

Presiding Juror

2. **We, the jury, find the defendant guilty of (... crime charged Count 2 ...).**

Presiding Juror

We, the jury, find the defendant not guilty of (... crime charged Count 2 ...).

Presiding Juror

Notes on Use

This form may be used when the defendant is charged with multiple counts in the same information. The verdict form may be expanded for additional counts and should be completed by specifying the crime charged in each count. The Committee recommends that the verdicts as to each count be submitted on a separate form.

Comment

Before July 1, 2011 Revisions to Criminal Code

Each count of an indictment is a separate offense; hence, consistency in the verdicts is not necessary. *Speers v. United States*, 387 F.2d 698 (10th Cir. 1967).

A trial court may properly retry an accused on a theft charge, where the original trial on theft and burglary charged in two separate counts in the same information resulted in an acquittal of the burglary charge and a mistrial on the theft charge due to the inability of the jury to reach a verdict; not double jeopardy; jury verdicts need not be consistent. *In re Shotwell & Grades*, 4 Kan. App. 2d 382, 607 P.2d 83 (1980).

68.080

LESSER INCLUDED OFFENSES

The offense of insert principal offense charged with which defendant is charged includes the lesser offense(s) of insert lesser included offense or offenses.

You may find the defendant guilty of insert principal offense charged, insert first lesser included offense, insert second lesser included offense, or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he) (she) may be convicted of the lesser offense only, provided the lesser offense has been proven beyond a reasonable doubt.

Your Presiding Juror should mark the appropriate verdict.

Notes on Use

For authority, see K.S.A. 21-5109. Under the current statute, the information/evidence test as enunciated in *State v. Fike*, 243 Kan. 365, 757 P.2d 724 (1988), is no longer applicable.

This instruction should not be used when the crime is first-degree murder under the alternative theories of premeditated murder and felony murder. Instead, use PIK 4th 68.190 and 68.200.

Comment
(Cases after July 1, 1998)

A trial court must instruct a jury on a lesser included offense when there is some evidence that would reasonably justify a conviction of the lesser offense. If the defendant requests the instructions, the trial court has a duty to instruct the jury regarding all lesser included crimes established by the evidence regardless of whether the evidence is weak or inconclusive. However, the duty to so instruct arises only when there is evidence supporting the lesser crime. An instruction on a lesser included offense is not required if the jury could not reasonably convict the defendant of the lesser included offense based on the evidence presented. *State v. Boyd*, 281 Kan. 70, 93, 127 P.3d 998 (2006) (quoting *State v. Drennan*, 278 Kan. 704, 712-13, 101 P.3d 1218 (2004)).

"An instruction on a lesser included offense is not foreclosed because it is inconsistent with either the evidence presented by the defense or the theory advanced by the defense. A defendant is entitled to inconsistent defenses." *State v. Williams*, 303 Kan. 585, 599, 363 P.3d 1101 (2016).

In *State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018), the Supreme Court held a district court is not required to instruct a jury to consider a lesser included homicide offense simultaneously with any greater homicide offense. Overruling *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003), the court found the rule requiring simultaneous consideration of the lesser included offense of voluntary manslaughter contemporaneously with premeditated first-degree murder and intentional second-degree murder was confusing, unworkable, and without basis in statute or the Constitution. "The kind of sequential instructions contemplated by our pattern instructions eliminate the confusion and difficulty that will surely ensue when a jury is instructed to simultaneously consider first-degree murder and every lesser included offense at the same time." See also *State v. James*, 309 Kan. 1280, 443 P. 3d 1063 (2019).

1. **Criminal Threat** - Conviction for criminal threat and harassment by telephone are not multiplicitous. *State v. Schuette*, 273 Kan. 593, 44 P.3d 459 (2002).
2. **Kidnapping or Aggravated Kidnapping** - The crimes of interference with parental custody and aggravated interference with parental custody are not lesser included offenses of kidnapping. *State v. Wiggett*, 273 Kan. 438, 44 P.3d 381 (2002). Criminal restraint constitutes a lesser degree of the crime of kidnapping and is, therefore, a lesser included crime of kidnapping. *State v. Ramirez*, 299 Kan. 224, 328 P.3d 1075 (2014).
3. **Robbery or Aggravated Robbery** - Obtaining by threat control over property is not a lesser included crime of robbery or aggravated robbery. However, theft of lost or mislaid property is a lesser included crime. *State v. Sandifer*, 270 Kan. 591, 17 P.3d 921 (2001). Robbery and certain types of theft may be lesser included offenses of aggravated robbery. *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006).
4. **Sexual Exploitation of a Child** - Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).
5. **Battery or Aggravated Battery** - A severity level 7 aggravated battery charge that a defendant intentionally caused bodily harm to another person in any manner whereby great bodily harm, disfigurement, or death could be inflicted is a lesser included offense of a severity level 4 aggravated battery charge that the defendant intentionally caused great bodily harm to another person because all elements of the level 7 aggravated battery are identical to some of the elements of the level 4 aggravated battery. K.S.A. 21-3107(2)(b). *State v. Winters*, 276 Kan. 34, 72 P.3d 564 (2003). The crimes of severity levels 5 and 8 aggravated battery are both lesser included offenses of severity level 4 aggravated battery because they are lesser included degrees of the same crime pursuant to K.S.A. 21-3107(2)(a). *State v. McCarley*, 287 Kan. 167, 195 P.3d 230 (2008). Reckless aggravated battery under K.S.A. 21-5413(b)(2)(B) is a lesser included offense of knowing aggravated battery under K.S.A. 21-5413(b)(1)(C) because it is a lesser degree of the same crime. *State v. Green*, 55 Kan. App. 2d 595, Syl. ¶ 9, 419 P.3d 83 (2018). Battery is a lesser included offense of domestic battery. *State v. Harris*, 46 Kan. App. 2d 848, 264 P.3d 1055 (2011). Domestic battery under K.S.A. 21-5414(a)(1) is not a lesser included offense of aggravated battery under K.S.A. 21-5413(b)(1)(A). *State v. Carter*, 54 Kan. App. 2d 34, 395 P.3d 458 (2017).

6. **Child Abuse** - Endangering a child is not a lesser included offense of child abuse. *State v. Boyd*, 281 Kan. 70, 94, 127 P.3d 998 (2006). Severity level 7 aggravated battery under K.S.A. 21-3414(a)(1)(B) or (C) is not a lesser included offense of child abuse. *State v. Alderete*, 285 Kan. 359, 172 P.3d 27 (2007).
7. **Premeditated Murder** - Second-degree intentional murder is a lesser included offense of premeditated first-degree murder because all the elements of second-degree murder are identical to some of the elements of first-degree murder. *State v. Warledo*, 286 Kan. 927, 190 P.3d 937 (2008). The defendant has a right to an instruction on second-degree intentional murder as long as the evidence, when viewed in the light most favorable to the defendant, would reasonably justify a jury's conviction on the offense, and the evidence does not exclude a theory of guilt on second-degree murder. *State v. Jones*, 279 Kan. 395, 401, 109 P.3d 1158 (2005); *State v. Scaife*, 286 Kan. 614, 186 P.3d 755, 760 (2008). Premeditated first-degree murder defined by K.S.A. 21-3401(a) is a lesser included offense of capital murder defined by K.S.A. 21-3439(a). *State v. Martis*, 277 Kan. 267, Syl. ¶ 1, 83 P.3d 1216 (2004). To justify instructing the jury on the lesser included offense of voluntary manslaughter arising from sudden quarrel or heat of passion, there must be severe provocation. *State v. Northcutt*, 290 Kan. 224, Syl. ¶ 4, 224 P.3d 564 (2010). "Reckless second-degree murder is a lesser included offense of premeditated first-degree murder." *State v. Martinez*, 288 Kan. 443, 453, 204 P.3d 601 (2009); *State v. Seba*, 305 Kan. 185, 380 P.3d 209 (2016). Reckless involuntary manslaughter is a lesser included offense of first-degree murder and second-degree murder. *State v. Seba*, 305 Kan. 185, 380 P.3d 209 (2016). Voluntary manslaughter is a lesser included offense of both first- and second-degree murder. *State v. Johnson*, 304 Kan. 924, 376 P.3d 70 (2016).
8. **Felony Murder** - K.S.A. 21-5402(d) eliminates lesser included offenses to felony murder. In *State v. Berry*, 292 Kan. 493, 254 P.3d 1276 (2011), the Supreme Court had determined that lesser included offense instructions must be given in all felony-murder cases when supported by evidence. In apparent response to that Supreme Court decision, a Senate bill amended K.S.A. 21-5109(b)(1) in the 2012 session to state that "there are no lesser degrees of murder in the first degree under subsection (a)(2) of K.S.A. 2011 Supp. 21-5402, and amendments thereto" (felony murder). A House bill also amended K.S.A. 21-5109 but did not include the Senate changes to K.S.A. 21-5109(b)(1).

In the 2013 session, the Legislature resolved any conflict by adding a new subsection (d) to K.S.A. 21-5402, the first degree murder statute. The new subsection now specifically refers to K.S.A. 21-5109(b)(1), declaring that felony murder is "an alternative method of proving murder in the first degree," not a separate crime that is distinct from premeditated first degree murder, that felony murder is not a lesser included offense of either premeditated murder or capital murder, and that there are no lesser included offenses of felony murder. The Legislature further specified that it intended this amendment to "establish a procedural rule...construed and applied retroactively to all cases currently pending." The amendment was effective July 1, 2013.

In *State v. Todd*, 299 Kan. 263, Syl. ¶4, 323 P.3d 829 (2014), the Supreme Court held that: "The 2013 amendments made in K.S.A. 2013 Supp. 21-5402(d) and (e) eliminated lesser included offenses of felony murder and expressly provided for retroactive application to cases pending on appeal on and after its effective date. Retroactive application of the amendment does not violate the federal Ex Post Facto Clause"

It is appropriate to instruct on lesser included offenses when a defendant is charged with the alternative manners of committing first degree murder, *i.e.*, felony murder and premeditated first degree murder. While felony murder is not a lesser included offense of first degree premeditated murder and felony murder has no lesser included offenses, premeditated first degree murder has lesser included offenses. If both alternate theories of first degree murder are rejected, then the jury would need to consider second degree murder and other lesser included offenses. *State v. Stewart*, 306 Kan. 237, 246-47, 393 P.3d 1031 (2017).

9. **Conspiracy to Commit Murder** - Conspiracy to commit murder is a separate and distinct crime from murder, not a lesser included offense. *Harris v. State*, 288 Kan. 414, 417, 204 P.3d 557 (2009).
10. **Aggravated Kidnapping** - Kidnapping and criminal restraint may be lesser included offenses of aggravated kidnapping under proper circumstances. *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006).
11. **Manufacture of Methamphetamine** - Possession of drug paraphernalia with intent to manufacture and possession of methamphetamine are not lesser included offenses of manufacture of methamphetamine. *State v. Unruh*, 281 Kan. 520, 133 P.3d 35 (2006); *State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006).
12. **Aggravated Indecent Solicitation of a Child** - Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child when the age of the child is not in dispute. *State v. Lowden*, 38 Kan. App. 2d 858, 174 P.3d 895 (2008).
13. **Involuntary Manslaughter While Driving Under the Influence of Alcohol** - Driving under the influence of alcohol is a lesser included offense of involuntary manslaughter while driving under the influence of alcohol. *State v. Brown*, 34 Kan. App. 2d 746, 124 P.3d 1035 (2005).
14. **Attempted First-Degree Murder** - Aggravated battery does not qualify as a lesser included crime of attempted first-degree murder under K.S.A. 21-3107(2)(a). First-degree murder involves killing and aggravated battery involves bodily harm. Each crime is defined by the harm caused rather than the act performed. An attempt requires the specific intent to commit the underlying crime. *State v. Gaither*, 283 Kan. 671, 156 P.3d 602 (2007).
15. **Drug Paraphernalia** - The misdemeanor crime of possession of drug paraphernalia is not a lesser included offense of felony possession of drug paraphernalia with the intent to use to package a controlled substance for sale. *State v. Dean*, 42 Kan. App. 2d 32, 208 P.3d 343 (2009).

16. **Fleeing or Attempting to Elude** - Moving violations are not lesser included offenses of the crime of fleeing or attempting to elude a police officer. *State v. Richardson*, 40 Kan. App. 2d 602, 194 P.3d 599 (2008).
17. **Rape** - Aggravated indecent liberties is not a lesser included offense of rape. *State v. Magallanez*, 290 Kan. 906, 235 P.3d 460 (2010).
18. **Theft** - Criminal deprivation of property is not a lesser included offense of theft. *State v. McKissick*, 283 Kan. 721, 156 P.3d 1249 (2007).

(Cases before July 1, 1998)

The trial court has a statutory duty to instruct the jury on lesser included offenses under K.S.A. 21-3107(3). This duty arises regardless of whether a party requests the giving of any lesser included instructions. *State v. Moncla*, 262 Kan. 58, 73-74, 936 P.2d 727 (1997). However, in *State v. Coffman*, 260 Kan. 811, 813, 925 P.2d 419 (1996), the Supreme Court noted that under K.S.A. 21-3107(3) a defendant who objects to the giving of a lesser included instruction waives any objection to the failure to instruct.

In *State v. Fike*, 243 Kan. 365, 757 P.2d 724 (1988), the Supreme Court adopted two tests to determine whether a lesser crime is a lesser included crime under K.S.A. 21-3107(2)(d). The first test is the statutory elements test. If all the statutory elements of the alleged lesser crime are among the statutory elements required to prove the crime charged, then it is a lesser included crime. If this test is not met, then the second test is applied. The second test is to examine the allegations of the information and the evidence to determine whether the crime as charged would necessarily prove the lesser crime. If so, the latter is an included crime upon which the jury must be instructed.

"[A defendant] has a right to an instruction on all lesser included offenses supported by the evidence at trial so long as (1) the evidence when viewed in the light most favorable to the defendant's theory, would justify a jury verdict in accord with the defendant's theory and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense." *State v. Harris*, 259 Kan. 689, 702, 915 P.2d 758 (1996).

The instructions on lesser included offenses should be given in the order of severity, beginning with the offense with the most severe penalties. When instructions on lesser included offenses are given, the jury should be instructed that if there is reasonable doubt as to which of two or more degrees of an offense the defendant is guilty, he may be convicted of the lesser offense only. *State v. Trujillo*, 225 Kan. 320, 590 P.2d 1027 (1979). However, in *State v. Massey*, 242 Kan. 252, 262, 747 P.2d 802 (1987), the Supreme Court held it was not reversible error to fail to give such an instruction.

Conspiracy is not a lesser included offense of a completed or attempted crime under the statutory test of *Fike* because a conspiracy requires an agreement between two or more persons. See *State v. Antwine*, 4 Kan. App. 2d 389, 397-98, 607 P.2d 519 (1980).

Solicitation was not held to be a lesser included offense of aiding and abetting first-degree murder. *State v. DePriest*, 258 Kan. 596, 604, 907 P.2d 868 (1995). See also *State v. Webber*, 260 Kan. 263, 280-2, 918 P.2d 609 (1996), *cert. denied*, 519 U.S. 1090, 136 L.Ed 2d 711, 117 S.Ct. 764 (1997), holding no error by the trial court in failing to instruct on criminal solicitation as a lesser included offense of either conspiracy to commit first-degree murder or aiding and abetting first-degree murder.

Examples of lesser included offenses are:

1. **Premeditated Murder** - The Court's duty to instruct on the lesser offenses of second-degree murder, voluntary and involuntary manslaughter depends on whether the evidence support instructions on any or all of the lesser included offenses. Generally, second-degree murder is included where the issue of premeditation may be in doubt. *State v. Yarrington*, 238 Kan. 141, 708 P.2d 524 (1985). Unless there is some evidence of arguments, heat of passion or an unintentional killing, generally voluntary and involuntary manslaughter are not given as lesser included offenses. Reckless second-degree murder, also called depraved heart murder, is a lesser included crime of first-degree murder. However, absent evidence to support recklessness, there is no duty to instruct. *State v. Pierce*, 260 Kan. 859, 865, 927 P.2d 929 (1996).
2. **Felony Murder** - Ordinarily, there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), *cert. denied*, 411 U.S. 951, 93 S. Ct. 1939, 36 L. Ed. 2d 413 (1973); *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937 (1992); *State v. Tyler*, 251 Kan. 616, 840 P.2d 413 (1992); but where there is an issue as to the felony itself, then an instruction on second-degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986). *State v. Arteaya*, 257 Kan. 874, 896 P.2d 1035 (1995). The instructions concerning lesser included offenses for the charge of felony murder should only be given if the proof of the underlying felony is inconclusive or questionable. *State v. Strauch*, 239 Kan. 203, 218, 718 P.2d 613 (1986).
3. **Second-Degree Murder** - The trial court erred in refusing to instruct on the lesser included offenses of voluntary manslaughter and involuntary manslaughter for the crime of murder in the second degree. *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987). The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second-degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 858 (1987).
4. **Voluntary Manslaughter** - Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
5. **Involuntary Manslaughter** - Where an unintentional homicide results from operation of a motor vehicle, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987). Because an attempt requires a specific intent to commit the crime charged, there is no such crime as attempted involuntary manslaughter, an unintentional killing. *State v. Collins*, 257 Kan. 408, 418, 893 P.2d 217 (1995).
6. **Attempted Murder** - Aggravated battery is not a lesser included offense of attempted murder. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977). The offenses of attempted second-degree murder and attempted voluntary manslaughter are lesser included crimes of attempted first-degree murder. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). There is no such crime as

attempted felony murder. *State v. Robinson*, 256 Kan. 133, 136, 883 P.2d 764 (1994). Aggravated assault is not a lesser included crime of attempted murder. *State v. Saiz*, 269 Kan. 657, Syl. 3, 7 P.3d 1214 (2000).

7. **Aggravated Kidnapping** - Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978); *State v. Hammond*, 251 Kan. 501, 837 P.2d 816 (1992). Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
8. **Kidnapping** - Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982). Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
9. **Aggravated Robbery** - Robbery is a lesser included offense only where there is an issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976). Under the second prong of the *Fike* test, aggravated battery may be a lesser included offense of aggravated robbery. *State v. Warren*, 252 Kan. 169, 181, 843 P.2d 224 (1992); *State v. Hill*, 16 Kan. App. 2d 432, 825 P.2d 1141 (1991). In *State v. Clardy*, 252 Kan. 541, 847 P.2d 694 (1993), the second prong of the *Fike* test was applied in holding that an instruction on battery as a lesser included offense of aggravated robbery was required. Theft by threat, or extortion, is not a lesser included offense of aggravated robbery. *State v. McCloud*, 257 Kan. 1, 15, 891 P.2d 324 (1995).
10. **Robbery** - Theft is now considered a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Holloway*, 214 Kan. 636, 522 P.2d 364 (1974). However, theft by threat, or extortion, is not a lesser included offense of robbery. *State v. Blockman*, 255 Kan. 953, 881 P.2d 561 (1994).
11. **Aggravated Assault** - Assault generally is a lesser included offense but if there is no issue as to use of weapon it would not be. *State v. Buckner*, 221 Kan. 117, 558 P.2d 1102 (1976); *State v. Cameron & Bentley*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).
12. **Aggravated Battery** - Battery generally is a lesser included offense unless there is no issue as to use of weapon. *State v. Gander*, 220 Kan. 88, 551 P.2d 797 (1976). Aggravated assault is not a lesser included offense. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977). Aggravated battery classified as a severity level 4 felony includes the lesser offenses of the same crime classified as severity level 5, 7 or 8 felonies. *State v. Ochoa*, 20 Kan. App. 2d 1014, 895 P.2d 198 (1995). Under evidence that the victim had suffered bodily harm which was either the result of intentional or reckless conduct, the court held it was not error to give a lesser included instruction for a level 8 aggravated battery when the defendant is charged in the information with committing a level 7 aggravated battery. *State v. Jackson*, 262 Kan. 119, 142-43, 936 P.2d 761 (1997).

13. **Aggravated Assault on Law Enforcement Officer** - Assault on law enforcement officer is a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).
14. **Aggravated Battery on Law Enforcement Officer** - Battery is a lesser included offense. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
15. **Aggravated Burglary** - Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
16. **Burglary** - Criminal damage to property is not a lesser included offense. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984). Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
17. **Theft** - Unlawful deprivation of property is a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985), reversing *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980). Theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are forms of the same crime of larceny and the former is a lesser included offense of the latter (assuming, of course, that the property is of a value of at least \$500.) *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992).
18. **Theft by Deception** - Delivery of a forged check may or may not be a lesser included offense of theft by deception depending on the charging document and the evidence produced at trial. *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991).
19. **Sale of Narcotics** - "Delivery" is not a lesser included offense. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976). "Possession" is not a lesser included offense. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974). Overruled on other grounds, *State v. Wilbanks*, 224 Kan. 66, 579 P.2d 132 (1978). *State v. Collins*, *infra*.
20. **Possession With Intent to Sell** - "Possession" is a lesser included offense. *State v. Collins*, 217 Kan. 418, 536 P.2d 1382 (1975); *State v. Newell*, 226 Kan. 295, 597 P.2d 1104 (1979).
21. **Rape** - Indecent liberties with a minor is a lesser included offense. *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983). Aggravated incest is not a lesser included offense. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987). In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), aggravated sexual battery was held not to be a lesser included offense of aggravated kidnapping, attempted aggravated sodomy or attempted aggravated rape because of the additional elements of a nonspousal relationship and intent to arouse or satisfy sexual desires. In *State v. Burns*, 23 Kan. App. 2d 352, 931 P.2d 1258 (1997), the court held aggravated indecent liberties with a child is a lesser included offense of rape under the information/evidence prong of the *Fike* test. However, in *State v. Belcher*, 269 Kan. 2, 4 P.3d 1137 (2000), the Supreme Court held

aggravated indecent liberties with a child under K.S.A. 21-3504(a)(3)(A) is not a lesser included offense of rape based upon sexual intercourse with a child under 14 years of age. The *Burns* decision was disapproved to the extent it held otherwise. Nevertheless, based upon the narrow holding in *Belcher*, the committee believes aggravated indecent liberties with a child under K.S.A. 21-3504(a)(1) (sexual intercourse with a child who is 14 or more years of age but less than 16 years of age) is a lesser included offense of rape under the information/evidence prong of *Fike*.

22. **Attempted Rape** - Battery is not a lesser included offense. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).
23. **Indecent Liberties With a Child** - Aggravated sexual battery is not a lesser included offense. *State v. Fike*, 243 Kan. 365, 367, 757 P.2d 724 (1988); *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989). Nor is battery a lesser included offense of aggravated indecent liberties with a child because "lewd" is not equivalent to "rude or insulting." *State v. Banks*, 273 Kan. 738, 46 P.3d 546 (2002).
24. **Aggravated Sodomy** - Lewd and lascivious behavior is not a lesser included offense. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).
25. **Unlawful Possession of Firearm** - Carrying a concealed weapon and aggravated weapons violation are not lesser included offenses. *State v. Hoskins*, 222 Kan. 436, 565 P.2d 608 (1977).
26. **DUI** - Reckless driving is not a lesser included offense. *State v. Mourning*, 233 Kan. 678, 664 P.2d 857 (1983).

68.090

ALTERNATIVE CHARGES

The Committee recommends that an alternative charge instruction not be given. If the defendant is charged in the alternative with multiplicitous charges, the jury should be free to enter a verdict upon each of the alternatives and PIK 4th 68.060, Multiple Counts—Verdict Instruction, is adequate.

However, the defendant cannot be convicted of multiplicitous crimes. *State v. Dixon*, 252 Kan. 39, 47, 843 P.2d 182 (1992). If the jury returns appropriate verdicts of guilty to multiplicitous charges, the trial court must accept only the verdict as to the greater charge under a doctrine of merger.

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68.100

MULTIPLE ACTS

The State claims distinct multiple acts which each could separately constitute the crime of insert crime. In order for the defendant to be found guilty of insert crime, you must unanimously agree upon the same underlying act.

Notes on Use

For authority, see K.S.A. 22-3421. This instruction is for use when distinct incidents separated by time or space are alleged by the State in a single count of the charging document. In circumstances where the State could have proceeded under multiple counts but chose not to do so, this instruction must be used. This form of charge presents a problem because the defendant is entitled to a unanimous jury verdict as to which incident constituted the crime.

Comment

Before July 1, 2011 Revisions to Criminal Code

In multiple acts cases, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. *State v. Timley*, 255 Kan. 286, Syl. ¶ 2, 875 P.2d 242 (1994). See also *State v. Barber*, 26 Kan. App. 2d 330, 988 P.2d 250 (1999); *State v. Davis*, 275 Kan. 107, 61 P. 3d 701 (2003); and *State v. Aguilar*, 52 Kan. App. 2d 466, 367 P.3d 324 (2016).

The structural error analysis used in *Timley* and *Barber* was rejected by the Supreme Court in *State v. Hill*, 271 Kan. 929, 26 P.3d 1267 (2001), where the court applied instead a harmless error analysis. Nonetheless, the court warned, "This holding should not be interpreted to give prosecutors carte blanche to rely on harmless error review, and it is strongly encouraged that prosecutors elect a specific act or the trial court issue a specific unanimity instruction. In many cases involving several acts, the requirement that an appellate court conclude beyond a reasonable doubt as to all acts will not be found harmless." 271 Kan. at 940.

A multiple acts case is distinguishable from a multiple means case. Unanimity is not required as to the means by which a crime was committed so long as substantial evidence supports each alternative means. *State v. Timley*, 255 Kan. 286, Syl. ¶ 1.

When the factual circumstances of a crime involve a "short, continuous, single incident" comprised of several acts individually sufficient for conviction, jury unanimity requires only that the jury agree to an act of the crime charged, not which particular act. *State v. Staggs*, 27 Kan. App. 2d 865, Syl. 2, 9 P.3d 601 (2000).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.C. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

68.110

LESSER INCLUDED OFFENSES—VERDICT FORMS

We, the jury, find the defendant guilty of insert principal offense charged .

Presiding Juror

We, the jury, find the defendant guilty of insert lesser included offense .

Presiding Juror

We, the jury, find the defendant not guilty.

Presiding Juror

Notes on Use

A verdict form should be completed for each criminal offense charged. A verdict form should also include any lesser included offenses under the crime charged and a verdict of not guilty.

Comment

Before July 1, 2011 Revisions to Criminal Code

The submission of a verdict form of guilty and not guilty for the main charge and each lesser included offense is misleading to the jury and error. *State v. Schaefer*, 190 Kan. 479, 375 P.2d 638 (1962).

The trial court's use of only one all-inclusive verdict form with guilty or not guilty alternatives listed for the charged crime and each lesser included offense is criticized in *State v. Franklin*, 264 Kan. 496, 505, 958 P.2d 611 (1998). The Supreme Court stated that PIK 68.10 should be followed where lesser included offense instructions are present.

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68.120

VERDICT FORM—VALUE IN ISSUE

We, the jury, find the defendant guilty of insert crime and find the (value of) (damage to) (amount of) the [(property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s])] to be:

_____ dollars (\$_____) or more ☐

At least _____ dollars (\$_____),
but less than _____ dollars (\$_____) ☐

[Less than \$25,000 and was a firearm ☐

Less than _____ dollars (\$_____) ☐

(Place an X in the appropriate square.)

Presiding Juror

Notes on Use

Complete the form by selecting the applicable bracketed and parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. PIK 4th 68.040, Not Guilty Verdict—General Form, must be used with this form.

See Comment to and Notes on Use to PIK 4th 58.480, Value in Issue.

Comment

Before July 1, 2011 Revisions to Criminal Code

In *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814 (1987), the Court held that the trial court erred by allowing the jury to consider sales tax in its determination of the value of the merchandise stolen from a retail store.

The value to be used in determining whether theft is a felony or misdemeanor is the fair market value of the property taken. *State v. Robinson*, 4 Kan. App. 2d 428, 608 P.2d 1014 (1980).

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68.121

**VERDICT FORM—VALUE IN ISSUE
THEFT OF REGULATED SCRAP METAL**

We, the jury, find the defendant guilty of theft of regulated scrap metal and find:

- the value of the regulated scrap metal is greater than the cost to restore the site of the theft of the regulated scrap metal to its condition immediately prior to the theft of the regulated scrap metal. ☐

OR

- the cost to restore the site of the theft of the regulated scrap metal to its condition immediately prior to the theft of the regulated scrap metal is higher than the value of the regulated scrap metal. ☐

(Place an X in the appropriate square.)

We further find that greater value or cost to be:

_____ dollars (\$_____) or more ☐

At least _____ dollars (\$_____),
but less than _____ dollars (\$_____) ☐

Less than _____ dollars (\$_____) ☐

(Place an X in the appropriate square.)

Presiding Juror

Notes on Use

For authority, see K.S.A. 21-5801(c)(3). For a definition of regulated scrap metal see K.S.A. 50-6,109. PIK 4th 68.040, Not Guilty Verdict—General Form, must be used with this form.

68.130

**VERDICT FORM—COUNTERFEITING MERCHANDISE
OR SERVICES—VALUE OR UNITS IN ISSUE**

We, the jury, find the defendant guilty of counterfeiting and find the (number of items) (retail value) of the (property) (services) counterfeited to be:

\$25,000 or more ☐

At least \$1,000 but less than \$25,000 ☐

Less than \$1,000 ☐

(Place an X in the appropriate square)

OR

1,000 items or more ☐

More than 100 items but less than 1,000 items ☐

(Place an X in the appropriate square)

Presiding Juror

Notes on Use

For use under K.S.A. 21-5825. Complete the form by selecting the applicable parenthetical expressions and the dollar amounts or items in issue. PIK 4th 68.040, Not Guilty Verdict—General Form, must be used with this form. See also PIK 4th 58.340, Counterfeiting Merchandise or Services—Value or Units in Issue.

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68.140

DEADLOCKED JURY

Like all cases, this is an important case. If you fail to reach a decision on some or all of the charges, that charge or charges are left undecided for the time being. It is then up to the state to decide whether to resubmit the undecided charge(s) to a different jury at a later time.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.

This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. You should treat the matter seriously and keep an open mind. If at all possible, you should resolve any differences and come to a common conclusion.

You may be as leisurely in your deliberations as the occasion may require and take all the time you feel necessary.

Notes on Use

In considering whether to give this instruction, the trial court should be mindful not only of the wording of the instruction but also of the timing of the instruction. If given at all, the Committee recommends this instruction be given before the jury begins its deliberations.

Comment

PIK 4th 68.140 does not refer to "another trial would be a burden to both sides," unlike previous versions of the Deadlocked Jury instruction. The Court of Appeals deemed this instruction an accurate statement of the law. *State v. Kimberlin*, 52 Kan. App. 2d 15, 362 P.3d 19 (2015).

In *State v. Boyd*, 206 Kan. 597, 481 P.2d 1015 (1971), the Supreme Court reiterated this warning: "The practice of submitting a forcing type instruction after the jury has reported its failure to agree on a verdict is not commended and may well lead to prejudicial error. If such an instruction is to be given, trial courts would be well advised to submit the same before the jury retires, not afterward." See also *State v. Overstreet*, 288 Kan. 1, 200 P.3d 427 (2009).

In *State v. Roadenbaugh*, 234 Kan. 474, 483, 673 P.2d 1166 (1983), the Court held it is not error to give the Allen charge before the jury retires.

In *State v. Poole*, 252 Kan. 108, 843 P.2d 689 (1992), the Kansas Supreme Court emphasized the need to exercise caution in giving the Allen-type instruction. The Court stressed that ". . . timing can be very important in determining prejudicial error." It observed that the defendant had failed to furnish a record that affirmatively reflected prejudicial error as to when the deliberations began, when the Allen-type instruction was given, if the trial judge made additional remarks, and when the jury reached its verdict. In the absence of such record, the Court acknowledged that there is a presumption that the actions of the trial court were proper.

For discussion of the Allen charge in Kansas in criminal cases, see "Criminal Law - Jury Instructions - The Allen Charge," 6 Washburn L.J. 517 (1967).

In *State v. Noriega*, 261 Kan. 440, 452-56, 932 P.2d 940 (1997), without objection of the defendant, a modified *Allen* instruction was given to the jury before retiring to deliberate. On appeal, the defendant complained that the instruction was coercive. The Supreme Court noted that although there was no compelling reason to have departed from PIK Crim. 68.12, the defendant failed to show his right to a fair trial or a unanimous verdict was prejudiced.

In *State v. Whitaker*, 255 Kan. 118, 128, 872 P.2d 278 (1994), the defendant challenged a modified *Allen* instruction. The Supreme Court approved the use of PIK instructions but found that a non-PIK instruction given was not clearly erroneous because it did not require the jurors to change their votes or compromise individual judgments for the sake of reaching an agreement or judicial expediency.

The Supreme Court's reasoning for continued disapproval of a deadlock instruction given after the jury has begun deliberations is that such an instruction could be coercive or exert undue pressure on the jury to reach a verdict. One of the primary concerns with an *Allen*-type instruction has always been its timing. When the instruction is given before jury deliberations, some of the questions as to its coercive effect are removed. *State v. Struzik*, 269 Kan. 95, 5 P.3d 502 (2000). See also, *State v. Makthepharak*, 276 Kan. 563, 568-569, 78 P.3d 412 (2003).

In *State v. Turner*, 34 Kan. App. 2d 131, 115 P.3d 776 (2005), the language of former PIK Crim. 3d 68.12 which instructed the jury that "[l]ike all cases, it [the case] must be decided sometime" was disapproved as an inaccurate statement of the law.

In *State v. Salts*, 288 Kan. 263, 200 P.3d 464 (2009), Syl. ¶ 2, the court held that although the language "[a]nother trial would be a burden on both sides" used in a prior version of PIK 3d 68.12 was misleading, inaccurate, and confusing, it was harmless error since the defendant did not object to the jury instruction. However, when the defendant objected to the trial court's instruction which included the same sentence, the court of appeals reversed the defendant's conviction in *State v. Page*, 41 Kan. App. 2d 584, 203 P.3d 1277 (2009).

68.150

POST-TRIAL COMMUNICATION WITH JURORS

Ladies and gentlemen, you have completed your duties as jurors in the case and are discharged with the thanks of the Court. It is my duty to instruct you that you have an absolute right to discuss or not discuss your deliberations or verdict in this case with anyone.

Immediately after I have discharged you here today, the parties or their lawyers or other representatives of the parties may discuss the case with you, but only if you consent. Whether you discuss the case with anyone is entirely your decision. If you choose to do so, you may share as much or as little as you like about your deliberations or the facts that influenced your decision.

If the parties or their lawyers or other representatives of the parties attempt to discuss this case with you at any later time, they must first inform you of the identity of the case, their role in the case, and the subject of their requested discussion. They also must inform you of your absolute right to discuss or not discuss the case with them. If any sort of declaration has been filed with the Court regarding the jury's deliberations or verdict, the person requesting the discussion with you must offer to provide you with a copy of the declaration for your review.

You must promptly report to this Court if the parties or the lawyers or other representatives of the parties make any unreasonable contact with you, or if they attempt to discuss the case with you, without your consent. Such contact or discussion may be a violation of this Court's order.

This rule does not prevent me as the judge from discussing with you the deliberations or verdict of the jury for any lawful purpose. This rule would also not prevent a law enforcement officer from discussing with you the deliberations or verdict of the jury if the officer is investigating an allegation of criminal conduct.

Notes on Use

Supreme Court Rule 181 governs posttrial calling of jurors and provides that jurors shall not be called for hearing on posttrial motions without an order of the Court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized, if possible.

Supreme Court Rule 226 MRPC 3.5 provides that "[a] lawyer shall not: communicate or cause another to communicate with a member of a jury or the venire from which the jury will be selected about matters under consideration other than in the course of official proceedings until after the discharge of the jury from further consideration of the case."

For authority, see K.S.A. 22-3440.

Comment

Before July 1, 2011 Revisions to Criminal Code

Jurors shall not be called for posttrial hearings without an order of the Court after motion. The burden is upon the party seeking the order to show the necessity for the order. *Cornejo v. Probst*, 6 Kan. App. 2d 529, 630 P.2d 1202 (1981); *Walters v. Hitchcock*, 237 Kan. 31, 697 P.2d 847 (1985); *State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985); *State v. Ruebke*, 240 Kan. 493, 731 P.2d 842 (1987).

68.160

**MURDER IN THE FIRST DEGREE—MANDATORY 40 YEAR
SENTENCE—VERDICT FORM FOR LIFE IMPRISONMENT
WITH PAROLE ELIGIBILITY AFTER 15 YEARS**

SENTENCING VERDICT

**We, the jury, impaneled and sworn, do upon our oath or affirmation,
unanimously determine that a sentence of LIFE IMPRISONMENT WITH
PAROLE ELIGIBILITY AFTER 15 YEARS be imposed by the Court.**

Presiding Juror

_____, _____.

Notes on Use

The mandatory 40 year sentence applies only to premeditated murder occurring before July 1, 1994. See K.S.A. 21-6629.

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68.170

**MURDER IN THE FIRST DEGREE—MANDATORY 40 YEAR
SENTENCE—VERDICT FORM FOR LIFE IMPRISONMENT
WITH PAROLE ELIGIBILITY AFTER 40 YEARS****SENTENCING VERDICT**

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- ☐ **[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]**
- ☐ **[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]**
- ☐ **[That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]**
- ☐ **[That the defendant authorized or employed another person to commit the crime.]**
- ☐ **[That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]**
- ☐ **[That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]**
- ☐ **[That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]**

- ☐ **[That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]**

and so, therefore, unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS be imposed by the Court.

Presiding Juror

_____, _____.

Notes on Use

The mandatory 40 year sentence applies only to premeditated murder occurring before July 1, 1994. See K.S.A. 21-6629.

The applicable bracketed clauses should be included in the verdict form.

Comment

Before July 1, 2011 Revisions to Criminal Code

"In *State v. Spain*, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that [K.S.A. 1999 Supp. 21-4635(c)] was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death." *State v. Kleypas*, 272 Kan. 894, 1009, 40 P.3d 139 (2001).

68.175

**PREMEDITATED MURDER IN THE FIRST DEGREE—
MANDATORY 50 YEAR SENTENCE—CRIMES COMMITTED
ON OR AFTER SEPTEMBER 6, 2013 BUT PRIOR TO JULY 1, 2014**

SENTENCING VERDICT

We, the jury, unanimously find beyond a reasonable doubt that one or more of the following aggravating circumstances have been established by the evidence. [The Presiding Juror shall place an X in the square in front of any aggravating circumstance(s) established by the evidence.]

- ☐ **[The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death.]**
- ☐ **[The defendant knowingly or purposely killed or created a great risk of death to more than one person.]**
- ☐ **[The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]**
- ☐ **[The defendant authorized or employed another person to commit the crime.]**
- ☐ **[The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]**
- ☐ **[The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]**
- ☐ **[The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]**

- ☐ **[The defendant committed the crime in an especially heinous, atrocious or cruel manner.]**

Presiding Juror**Notes on Use**

For authority, see K.S.A. 21-6620(d). "If a defendant is convicted of murder in the first degree based upon a finding of premeditated murder, upon reasonable notice by the prosecuting attorney, the court shall determine, in accordance with this subsection, whether the defendant shall be required to serve a mandatory minimum term of imprisonment of 50 years or sentenced as otherwise provided by law." K.S.A. 21-6620(d)(1).

If the State asserts the first aggravating circumstance, and the trial judge finds that one or more of the defendant's prior convictions satisfy K.S.A. 21-6624(a), the jury shall be instructed that a certified journal entry of a prior conviction is presumed to prove the existence of the prior conviction beyond a reasonable doubt. K.S.A. 21-6620(d)(4).

If one or more aggravating circumstances are found to exist beyond a reasonable doubt, the defendant is sentenced pursuant to K.S.A. 21-6623, "unless the sentencing judge finds substantial and compelling reasons, following a review of mitigating circumstances," to impose the sentence provided in K.S.A. 21-6620(d)(6).

68.176

**PREMEDITATED MURDER IN THE FIRST DEGREE—
MANDATORY 50 YEAR SENTENCE—CRIMES COMMITTED
ON OR AFTER JULY 1, 1999 AND PRIOR TO SEPTEMBER 6, 2013**

SENTENCING VERDICT

We, the jury, unanimously find beyond a reasonable doubt that one or more of the following aggravating circumstances have been established by the evidence. [The Presiding Juror shall place an X in the square in front of any aggravating circumstance(s) established by the evidence.]

- ☐ **[The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death.]**
- ☐ **[The defendant knowingly or purposely killed or created a great risk of death to more than one person.]**
- ☐ **[The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]**
- ☐ **[The defendant authorized or employed another person to commit the crime.]**
- ☐ **[The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]**
- ☐ **[The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]**
- ☐ **[The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]**

- ☐ **[The defendant committed the crime in an especially heinous, atrocious or cruel manner.]**

Presiding Juror

Having found that one or more aggravating circumstances are established by the evidence, as indicated above, we, the jury, further find unanimously and beyond a reasonable doubt that the established aggravating circumstance(s) are not outweighed by any mitigating circumstance(s) found to exist.

Presiding Juror

Notes on Use

For authority, see K.S.A. 21-6620(e).

If the State asserts the first aggravating circumstance, and the trial judge finds that one or more of the defendant's prior convictions satisfy K.S.A. 21-6624(a), the jury shall be instructed that a certified journal entry of a prior conviction is presumed to prove the existence of the prior conviction beyond a reasonable doubt. K.S.A. 21-6620(e)(4).

68.180

**CAPITAL MURDER—VERDICT FORM FOR
SENTENCE OF DEATH****SENTENCING VERDICT**

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- ☐ **[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]**
- ☐ **[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]**
- ☐ **[That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]**
- ☐ **[That the defendant authorized or employed another person to commit the crime.]**
- ☐ **[That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]**
- ☐ **[That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]**
- ☐ **[That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]**

- ☐ **[That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]**

and so, therefore, unanimously sentence the defendant to death.

Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-6617(e).

Use only the bracketed clauses in this verdict form that have been contained in the State's notice and supported by the evidence.

68.190

**MURDER IN THE FIRST DEGREE—PREMEDITATED
MURDER AND FELONY MURDER IN THE
ALTERNATIVE—VERDICT INSTRUCTION**

The defendant is charged with one offense of murder in the first degree. This verdict instruction will guide you on the verdicts you shall consider.

You may find the defendant guilty of murder in the first degree; or murder in the second degree; or voluntary manslaughter; or involuntary manslaughter; or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only. Your Presiding Juror will sign the verdict form upon which you agree. The other verdict forms are to be left unsigned.

First, you shall consider whether the defendant is guilty of murder in the first degree. If you find defendant is guilty of murder in the first degree, the Presiding Juror shall sign the applicable verdict form and, in addition, you shall then determine the alternative theory or theories contained in "Theory 1(a)", "Theory 1(b)", or "Theory 1(c)". The Presiding Juror shall sign the applicable alternative theory verdict form(s).

Second, if you do not find the defendant guilty of murder in the first degree, you should then consider the lesser offense of murder in the second degree as defined in Instruction No. ____.

Third, if you do not find the defendant guilty of murder in the second degree, you should then consider the lesser offense of voluntary manslaughter as defined in Instruction No. ____.

Fourth, if you do not find the defendant guilty of voluntary manslaughter, you should then consider the lesser offense of involuntary manslaughter as defined in Instruction No. ____.

Fifth, if you do not find the defendant guilty of involuntary manslaughter, you shall find defendant not guilty.

Notes on Use

For authority, see *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976). The pattern should be given along with PIK 4th 68.200, Murder in the First Degree—Premeditated Murder and Felony Murder in the Alternative—Verdict Form, when the defendant is charged with murder in the first degree under the alternative theories of premeditated murder and felony murder.

The instruction should be used instead of an instruction under PIK 4th 68.060, Multiple Counts—Verdict Instruction and PIK 4th 68.070, Multiple Counts—Verdict Forms. In addition, the applicable lesser included offenses should be selected.

Comment

In *State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018), the Supreme Court held a district court is not required to instruct a jury to consider a lesser included homicide offense simultaneously with any greater homicide offense. Overruling *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003), the court found the rule requiring simultaneous consideration of the lesser included offense of voluntary manslaughter contemporaneously with premeditated first-degree murder and intentional second-degree murder was confusing, unworkable, and without basis in statute or the Constitution. "The kind of sequential instructions contemplated by our pattern instructions eliminate the confusion and difficulty that will surely ensue when a jury is instructed to simultaneously consider first-degree murder and every lesser included offense at the same time." See also *State v. James*, 309 Kan. 1280, 443 P. 3d 1063 (2019).

Before July 1, 2011 Revisions to Criminal Code

The basic purpose of the felony-murder rule is to relieve the State of the burden of proving premeditation and malice when the death of the victim is caused by the defendant in the commission of a felony. *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

As felony murder is a method of proof to support a verdict of first-degree murder, the Court in *Wilson*, held that when an accused is charged in one count of an information with both premeditated murder and felony murder it ". . . matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose. In such case the verdict is unanimous and guilty of murder in the first degree has been satisfactorily established. If a verdict of first-degree murder can be justified on either of two interpretations of the evidence, premeditation or felony murder, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation of the evidence and part on another." *State v. Wilson*, 220 Kan. at 345.

The holding in *Wilson* has consistently been followed by the Supreme Court. See *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991); *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); *State v. Wise*, 237 Kan. 117, 697 P.2d 1295 (1985); and *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

The enactment of the mandatory minimum 40 year sentence in premeditated murder, effective July 1, 1990, requires, however, an instruction to determine whether the jury unanimously found the defendant guilty of premeditated murder. See K.S.A. 21-4624. The purpose of this pattern and PIK 3d 68.16, Murder in the First Degree—Premeditated Murder and Felony Murder in the Alternative—Verdict Form, is to provide a verdict form for the jury to determine whether the defendant is guilty of first-degree murder under the alternative theories of premeditated murder or felony murder. As to a charge of first-degree murder committed on or after July 1, 1990, and prior to July 1, 1994, if the jury finds unanimously that the defendant is guilty of premeditated murder, the State having been given the required notice, the matter proceeds to a sentencing hearing before the trial jury to determine whether the mandatory minimum sentence of 40 years should be imposed. On the other hand, if the jury unanimously finds the defendant guilty of murder in the first degree from a combination of premeditated murder and felony murder, the matter does not proceed to the "Hard 40" sentencing hearing.

With the enactment of the crime of capital murder in 1994, the legislature eliminated the procedure for a jury determination of application of the minimum 40-year sentence upon findings of aggravating and mitigating factors. That procedure is now used in cases of capital murder if the death sentence is requested. K.S.A. 21-4622 to 21-4624. If the defendant is convicted of first-degree murder, rather than capital murder, upon a finding of premeditation, the court may impose the mandatory minimum 40-year sentence. The finding of premeditation remains a jury function, and the foregoing instruction must be given where the State introduces evidence upon theories of premeditation and felony murder.

68.200

**MURDER IN THE FIRST DEGREE—PREMEDITATED MURDER
AND FELONY MURDER IN THE ALTERNATIVE—
VERDICT FORM**

VERDICT FORM

- 1. We, the jury, unanimously find the defendant guilty of murder in the first degree.**

Presiding Juror

Theory 1(a) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of premeditated murder.

Presiding Juror

Theory 1(b) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of felony murder.

Presiding Juror

Theory 1(c) We, the jury, unable to agree under Theory 1(a) or 1(b), do unanimously find the defendant guilty of murder in the first degree on the combined theories of premeditated murder and felony murder.

Presiding Juror

- 2. We, the jury, unanimously find the defendant guilty of murder in the second degree.**

Presiding Juror

- 3. We, the jury, unanimously find the defendant guilty of voluntary manslaughter.**

Presiding Juror

- 4. We, the jury, unanimously find the defendant guilty of involuntary manslaughter.**

Presiding Juror

- 5. We, the jury, unanimously find the defendant not guilty.**

Presiding Juror

Notes on Use

For authority, see *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

The instruction should be given with PIK 4th 68.190, Murder in the First Degree—Premeditated Murder and Felony Murder in the Alternative—Verdict Instruction.

Comment

See Comment to PIK 4th 68.190, Murder in the First Degree—Premeditated Murder and Felony Murder in the Alternative—Verdict Instruction.

68.210

**CAPITAL MURDER—VERDICT FORM FOR SENTENCE AS
PROVIDED BY LAW—ALTERNATIVE SENTENCE**

SENTENCING VERDICT

**We, the jury, impaneled and sworn, do upon our oath or affirmation,
state that we are unable to reach a unanimous verdict sentencing the defendant
to death.**

Presiding Juror

_____, _____.

Notes on Use

For crimes committed prior to July 1, 2004, convicted capital murder defendants not sentenced to death by the jury are sentenced by the court as otherwise provided by law. For crimes committed on or after July 1, 2004, convicted capital murder defendants not sentenced to death by the jury are sentenced by the court to life in prison without possibility of parole. K.S.A. 21-6617(e) and K.S.A. 21-6620.

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69.010**MURDER IN THE FIRST DEGREE WITH LESSER
INCLUDED OFFENSES****Summary of the Facts and Issues**

Wilbur Smith was married to Winnie Smith. Winnie was having an affair with John Green. On a number of occasions, Wilbur Smith and John Green engaged in fist fights and there was "bad blood" between them. On the evening of July 5, 2016, Wilbur Smith shot and killed John Green with a .22 caliber revolver while the two were at the Deluxe Tavern in Lawrence, Kansas. Both of the men had been drinking. Some of the witnesses testified that Wilbur Smith took deliberate aim and shot John Green between the eyes. Other witnesses testified that immediately prior to the shooting Smith and Green were having a heated argument and threatening one another. Wilbur Smith testified that the shooting had been accidental and that he accidentally struck the gun against the side of a booth and the gun was discharged unintentionally and just happened to strike John Green. Wilbur Smith testified that he had the gun only to frighten John Green and he thought the trouble could be avoided if he exhibited a gun.

An Outline of Suggested Instructions in Sequence Follows:

Instruction 1. PIK 4th 50.040, Consideration and Binding Application of Instructions.

PIK 4th 50.050, Consideration of Evidence.

PIK 4th 50.060, Rulings of the Court.

PIK 4th 50.070, Statements and Arguments of Counsel.

- Instruction 2. PIK 4th 54.110, Murder in the First Degree.**
- Instruction 3. PIK 4th 68.080, Lesser Included Offenses.**
- Instruction 4. PIK 4th 54.140, Murder in the Second Degree.**
- Instruction 5. PIK 4th 54.170, Voluntary Manslaughter.**
- Instruction 6. PIK 4th 54.180, Involuntary Manslaughter.**
- Instruction 7. PIK 4th 55.150, Homicide Definitions.**
- Instruction 8. PIK 4th 51.010, Burden of Proof, Presumption of Innocence,
Reasonable Doubt.**
- Instruction 9. PIK 4th 51.060, Credibility of Witnesses.**
- Instruction 10. PIK 4th 68.010, Concluding Instruction.**
- Verdict Forms. PIK 4th 68.110, Lesser Included Offenses—Verdict
Forms.**

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You must decide the case by applying these instructions to the facts as you find them.

(PIK 4th 50.040)

In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

(PIK 4th 50.050)

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 4th 50.060)

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 4th 50.070)

Instruction No. 2.

The defendant is charged with murder in the first degree. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally killed John Green.**
- 2. The killing was done with premeditation.**
- 3. This act occurred on or about the 5th day of July, 2016, in Douglas County, Kansas.**

(PIK 4th 54.110)

Instruction No. 3.

The offense of murder in the first degree with which the defendant is charged includes the lesser offenses of murder in the second degree, voluntary manslaughter, and involuntary manslaughter.

You may find the defendant guilty of murder in the first degree, or murder in the second degree, or voluntary manslaughter, or involuntary manslaughter, or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only, provided the lesser offense has been proven beyond a reasonable doubt.

Your Presiding Juror should then mark the appropriate verdict.

(PIK 4th 68.080)

Instruction No. 4.

If you do not agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally killed John Green.**
- 2. This act occurred on or about the 5th day of July, 2016, in Douglas County, Kansas.**

(PIK 4th 54.140)

Instruction No. 5.

If you do not agree that the defendant is guilty of murder in the second degree, you should then consider the lesser included offense of voluntary manslaughter.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly killed John Green.**
- 2. It was done in the heat of passion.**
- 3. This act occurred on or about the 5th day of July, 2016, in Douglas County, Kansas.**

"Heat of passion" means any intense or vehement emotional excitement which was spontaneously provoked from circumstances. The emotional state of mind must be of such degree as would cause an ordinary person to act on impulse without reflection.

(PIK 4th 54.170)

Instruction No. 6.

If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.

To establish this charge, each of the following claims must be proved:

- 1. The defendant killed John Green;**
- 2. The killing was done recklessly.**
- 3. This act occurred on or about the 5th day of July, 2016, in Douglas County, Kansas.**

(PIK 4th 54.180)

Instruction No. 7.

As used in these instructions, the following words and phrases are defined as indicated:

Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.

A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State.

A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk that a result of the defendant's actions will follow.

This act by the defendant disregarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation.

(PIK 4th 54.150)

Instruction No. 8.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty.

(PIK 4th 51.010)

Instruction No. 9.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

(PIK 4th 51.060)

Instruction No. 10.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____.

(PIK 4th 68.010)

VERDICT FORMS

We, the jury, find the defendant guilty of murder in the first degree.

Presiding Juror

OR

We, the jury, find the defendant guilty of murder in the second degree.

Presiding Juror

OR

We, the jury, find the defendant guilty of voluntary manslaughter.

Presiding Juror

OR

We, the jury, find the defendant guilty of involuntary manslaughter.

Presiding Juror

OR

We, the jury, find the defendant not guilty.

Presiding Juror

(PIK 4th 68.110)

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69.020**THEFT WITH TWO PARTICIPANTS****Summary of the Facts and Issues**

Acme Department Store is located in Wichita, Kansas. On July 5, 2016, two men entered the store together. The defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store, Smith and Green proceeded to the men's department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later, John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

Instruction 1. PIK 4th 50.040, Consideration and Binding Application of Instructions.

PIK 4th 50.050, Consideration of Evidence.

PIK 4th 50.060, Rulings of the Court.

PIK 4th 50.070, Statements and Arguments of Counsel.

PIK 4th 51.060, Credibility of Witnesses.

Instruction 2. PIK 4th 58.010, Theft.

Instruction 3. PIK 4th 52.010, Culpable Mental State

Instruction 4. PIK 4th 58.480, Value in Issue.

**Instruction 5. PIK 4th 52.140, Responsibility for Crimes of Another—
Intended and Not Intended.**

**Instruction 6. PIK 4th 51.010, Burden of Proof, Presumption of Innocence,
Reasonable Doubt.**

Instruction 7. PIK 4th 68.010, Concluding Instruction.

**Verdict Forms. PIK 4th 68.120, Verdict of Guilty and Finding of Value of
Property.**

PIK 4th 68.040, Not Guilty Verdict.

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.

(PIK 4th 50.040)

In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

(PIK 4th 50.050)

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 4th 50.060)

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 4th 50.070)

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

(PIK 4th 51.060)

Instruction No. 2.

The defendant is charged with theft. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. Acme Department Store was the owner of the property.**
- 2. The defendant exerted unauthorized control over the property.**
- 3. The defendant intended to deprive Acme Department Store permanently of the use or benefit of the property.**
- 4. The value of the property was at least \$1,500 but less than \$25,000.**

5. This act occurred on or about the 5th day of July, 2016, in Sedgwick County, Kansas.

(PIK 4th 58.010)

Instruction No. 3.

The State must prove that the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property.

A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State or cause the result complained about by the State.

(PIK 4th 52.010)

Instruction No. 4.

The State has the burden of proof as to the value of the property over which the defendant allegedly exerted unauthorized control.

The State claims that the value of the property involved herein was in an amount of at least \$1,500 but less than \$25,000.

It is for you to determine the amount and enter it on the verdict form furnished.

(PIK 4th 58.480)

Instruction No. 5.

A person is criminally responsible for a crime committed by another if the person, either before or during its commission, and with the mental culpability required to commit the crime intentionally aids the other person to commit the crime.

(PIK 4th 52.140)

Instruction No. 6.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty.

(PIK 4th 51.010)

Instruction No. 7.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____.

(PIK 4th 68.010)

VERDICT FORMS

We, the jury, find the defendant guilty of theft and find the value of the property over which the defendant exerted unauthorized control to be:

At least one thousand, five hundred dollars (\$1,500) but less than twenty-five thousand dollars (\$25,000) ☐

Less than one thousand, five hundred dollars (\$1,500) ☐

(Place an X in the appropriate square)

Presiding Juror

(PIK 4th 68.120)

OR

We, the jury find the defendant not guilty of theft.

Presiding Juror

(PIK 4th 68.040)

69.030

**POSSESSION OF MARIJUANA WITH INTENT TO
SELL—ENTRAPMENT AS AN AFFIRMATIVE DEFENSE****Summary of the Facts and Issues**

On July 3, 2016, Detective James Ware was told by a confidential informant that John Spencer was selling marijuana. Ware contacted Spencer in a bar in Wichita, Kansas, where Spencer was employed as a bartender. Ware talked with Spencer on numerous occasions.

On each of those occasions, Ware told Spencer that he was interested in buying five to ten pounds of marijuana. Ware said he was nervous but he had been told Spencer could be trusted. On October 4, 2016, a price was negotiated and a meeting was set up for October 5, 2016 to complete the transaction.

When Spencer showed up for the meeting, Ware showed him the agreed amount of cash. Spencer then opened the trunk of his car to show Ware the marijuana. When Ware saw the marijuana in the trunk of the car, Spencer was arrested.

Spencer testified at trial that he had had many conversations with Ware but that he would not have agreed to sell the marijuana if Ware had not kept pressuring him.

In rebuttal testimony the confidential informant, Tyler Johnson, testified that he had been present on three occasions when Spencer had sold marijuana.

An Outline of Suggested Instructions in Sequence Follows:

Instruction 1. PIK 4th 50.040, Consideration and Binding Application of Instructions.

PIK 4th 50.050, Consideration of Evidence.

PIK 4th 50.060, Rulings of the Court.

PIK 4th 50.070, Statements and Arguments of Counsel.

PIK 4th 51.060, Credibility of Witnesses.

Instruction 2. PIK 4th 57.020, Distributing, Or Possessing With Intent to Distribute A Controlled Substance (Schedule I-IV).

Instruction 3. PIK 4th 52.010, Culpable Mental State

Instruction 4. PIK 4th 51.050, Affirmative Defenses—Burden of Proof.

Instruction 5. PIK 4th 52.110, Entrapment.

Instruction 6. PIK 4th 51.010, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Instruction 7. PIK 4th 68.010, Concluding Instruction.

Verdict Forms. PIK 4th 68.030, Guilty Verdict—General Form.

PIK 4th 68.040, Not Guilty Verdict—General Form.

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.

(PIK 4th 50.040)

In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

(PIK 4th 50.050)

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 4th 50.060)

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 4th 50.070)

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

(PIK 4th 51.060)

Instruction 2.

The defendant is charged with unlawfully possessing marijuana with intent to distribute it. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant possessed marijuana with intent to distribute.**
- 2. The quantity of the marijuana possessed with intent to distribute was at least 450 grams but less than 30 kilograms.**
- 3. This act occurred on or about the 5th day of October, 2016, in Sedgwick County, Kansas.**

"Distribute" means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale, or any act that causes an item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing, or prescribing a controlled substance as authorized by law.

"Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

(PIK 4th 57.020)

Instruction 3.

The State must prove that the defendant possessed marijuana with intent to distribute.

A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State or cause the result complained about by the State.

Instruction 4.

The defendant claims as a defense that he was entrapped. Evidence in support of this claim should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant.

(PIK 4th 51.050)

Instruction 5.

Entrapment is a defense if the defendant was induced by a public officer to commit a crime which the defendant had no previous disposition to commit. Entrapment is not a defense if the defendant originated the plan to commit the crime or when he had shown a predisposition for committing the crime and was merely afforded an opportunity to consummate the crime and was assisted by the public officer.

The defendant cannot rely on the defense of entrapment if you find that the distribution of marijuana was likely to occur in the course of defendant's usual activities and the public officer did not mislead the defendant into believing his conduct was lawful.

(PIK 4th 52.110)

Instruction No. 6.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty.

(PIK 4th 51.010)

Instruction No. 7.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____.
(PIK 4th 68.010)

VERDICT FORMS

We, the jury, find the defendant guilty of possession of marijuana with intent to distribute.

Presiding Juror

(PIK 4th 68.030)

OR

We, the jury, find the defendant not guilty of possession of marijuana with intent to distribute.

Presiding Juror

_____, _____.
(PIK 4th 68.040)

69.040**CAPITAL MURDER—GUILT AND PENALTY PHASES****Summary of the Facts and Issues**

Nineteen-year-old Phil Brown was an inmate at the El Dorado Correctional Facility serving a sentence for a voluntary manslaughter conviction. Brown had a slight build and was often harassed by other inmates. On a number of occasions, another inmate, Joe Jones, had been seen verbally and physically abusing Brown. On July 5, 2016, after a particularly loud argument and scuffle witnessed by several inmates, Brown killed Jones by stabbing him in the throat with a sharpened spoon he had stolen from the prison cafeteria. Some inmates testified they had heard Brown say that he was going to kill Jones and they had seen Brown sharpening his spoon. Other inmates testified that they had seen the two men arguing and that Jones never hit Brown before Jones was stabbed.

Brown testified that Jones, who was much larger than Brown, had attacked him and begun beating him for no apparent reason. Brown stated that he had suffered severe and systematic abuse at the hands of Jones, and that he armed himself with the sharpened spoon out of fear of further abuse by Jones. Brown stated that he killed Jones in self-defense. Psychologist Tracy Smith testified that Brown was suffering from post-traumatic stress disorder at the time of the killing. A doctor who examined Brown after the incident testified that Brown had cuts, bruises, and scars consistent with having been beaten.

Suggested Instruction to be Given Before Voir Dire:

PIK 4th 54.010, Capital Murder— Death Penalty Sought by State— Pre-Voir Dire Instruction

Outline of Suggested Instructions in Sequence—Guilt Phase:

Instruction 1. PIK 4th 50.040, Consideration and Binding Application of Instructions.

PIK 4th 50.050, Consideration of Evidence.

PIK 4th 50.060, Rulings of the Court.

PIK 4th 50.070, Statements and Arguments of Counsel.

PIK 4th 51.060, Credibility of Witnesses.

Instruction 2. PIK 4th 54.020, Capital Murder—Elements of the Offense.

Instruction 3. PIK 4th 68.080, Lesser Included Offenses.

Instruction 4. PIK 4th 54.140, Murder in the Second Degree.

Instruction 5. PIK 4th 54.170, Voluntary Manslaughter.

Instruction 6. PIK 4th 54.180, Involuntary Manslaughter.

Instruction 7. PIK 4th 54.150, Homicide Definitions.

Instruction 8. PIK 4th 52.200, Use of Force in Defense of Person.

Instruction 9. PIK 4th 51.010, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Instruction 10. PIK 4th 51.050, Affirmative Defenses—Burden of Proof.

**Instruction 11. PIK 4th 50.090, Penalty not to be Considered by Jury—
Cases that Include a Sentencing Proceeding.**

Instruction 12. PIK 4th 68.010, Concluding Instructions.

**Verdict Forms. PIK 4th 68.110, Lesser Included Offenses—Verdict
Forms.**

**TEXT OF SUGGESTED INSTRUCTION TO BE GIVEN BEFORE
VOIR DIRE**

In this case, the defendant is charged with the crime of capital murder. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether the defendant is guilty of capital murder and is instructed concerning the claims the state must prove to establish that charge. If the jury unanimously finds that the defendant is guilty of capital murder, then the second phase begins in which the same jury decides whether the defendant should be sentenced to death.

If there is a second phase, the jury will be separately instructed concerning the claims that must be proved for the death penalty to be imposed. The jury will also be instructed at that time that the defendant will be sentenced by the judge to imprisonment for life with no possibility of parole if a sentence of death is not imposed.

(PIK 4th 54.010)

TEXT OF SUGGESTED INSTRUCTIONS—GUILT PHASE**Instruction No. 1.**

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You must decide the case by applying these instructions to the facts as you find them.

(PIK 4th 50.040)

In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

(PIK 4th 50.050)

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 4th 50.060)

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 4th 50.070)

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

(PIK 4th 51.060)

Instruction No. 2.

The defendant is charged with capital murder. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally killed Joe Jones.**
- 2. The killing was done with premeditation.**
- 3. The defendant was an inmate or prisoner confined in a state correctional institution.**
- 4. The defendant was 18 or more years old at the time the killing occurred.**
- 5. This act occurred on or about the 5th day of July, 2016, in Butler County, Kansas.**

(PIK 4th 54.020)

Instruction No. 3.

The offense of capital murder with which defendant is charged includes the lesser offenses of murder in the second degree, voluntary manslaughter, and involuntary manslaughter.

You may find the defendant guilty of capital murder, murder in the second degree, voluntary manslaughter, involuntary manslaughter, or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only.

Your Presiding Juror should mark the appropriate verdict.

(PIK 4th 68.080)

Instruction No. 4.

If you do not agree that the defendant is guilty of capital murder, you should then consider the lesser included offense of murder in the second degree.

To establish this charge, each of the following claims must be proved:

- 1. The defendant intentionally killed Joe Jones.**
- 2. This act occurred on or about the 5th day of July, 2016, in Butler County, Kansas.**

(PIK 4th 54.140)

Instruction No. 5.

If you do not agree that the defendant is guilty of murder in the second degree, you should then consider the lesser included offense of voluntary manslaughter.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly killed Joe Jones.**
- 2. It was done upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person.**
- 3. This act occurred on or about the 5th day of July, 2016, in Butler County, Kansas.**

(PIK 4th 54.170)

Instruction No. 6.

If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.

To establish this charge, each of the following claims must be proved:

- 1. The defendant killed Joe Jones.**
- 2. The killing was done during the commission of a lawful act in an unlawful manner.**
- 3. This act occurred on or about the 5th day of July, 2016, in Butler County, Kansas.**

(PIK 4th 54.180)

Instruction No. 7.

As used in these instructions, the following words and phrases are defined as indicated:

Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.

A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State.

(PIK 4th 54.150)

Instruction No. 8.

The defendant claims his use of force was permitted as self-defense.

Defendant is permitted to use against another person physical force that is likely to cause death or great bodily harm only when and to the extent that it appears to him and he reasonably believes such force is necessary to prevent death or great bodily harm to himself from the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

When use of force is permitted as self-defense, there is no requirement to retreat.

(PIK 4th 52.200)

Instruction No. 9.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty.

(PIK 4th 51.010)

Instruction No. 10.

The defendant raises self-defense as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant.

(PIK 4th 51.050)

Instruction No. 11.

Your only concern, at this time, is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is not to be considered in arriving at your verdict.

(PIK 4th 50.090)

Instruction No. 12.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____.

(PIK 4th 68.010)

VERDICT FORMS

We, the jury, find the defendant guilty of capital murder.

Presiding Juror

OR

We, the jury, find the defendant guilty of murder in the second degree.

Presiding Juror

OR

We, the jury, find the defendant guilty of voluntary manslaughter.

Presiding Juror

OR

We, the jury, find the defendant guilty of involuntary manslaughter.

Presiding Juror

OR

We, the jury, find the defendant not guilty.

Presiding Juror

(PIK 4th 68.110)

Outline of Suggested Instructions in Sequence—Penalty Phase:

- Instruction 1.** **PIK 4th 54.030, Capital Murder—Death Sentence—Sentencing Proceeding.**
- Instruction 2.** **PIK 4th 50.050, Consideration of Evidence, Revised.**
- Instruction 3.** **PIK 4th 50.060, Rulings of the Court.**
- Instruction 4.** **PIK 4th 50.070, Statements and Arguments of Counsel.**
- Instruction 5.** **PIK 4th 51.060, Credibility of Witnesses.**
- Instruction 6.** **PIK 4th 54.040, Capital Murder—Death Sentence—Aggravating Circumstances.**
- Instruction 7.** **PIK 4th 54.050, Capital Murder—Death Sentence—Mitigating Circumstances.**
- Instruction 8.** **PIK 4th 54.060, Capital Murder—Death Sentence—State's Burden of Proof.**
- Instruction 9.** **PIK 4th 54.061, Capital Murder—Death Sentence—Proof of Mitigating Circumstances.**
- Instruction 10.** **PIK 4th 54.070, Capital Murder—Death Sentence—Aggravating and Mitigating Circumstances—Theory of Comparison.**
- Instruction 11.** **PIK 4th 54.090, Capital Murder—Death Sentence—Alternative Sentence.**
- Instruction 12.** **PIK 4th 54.100, Capital Murder—Death Sentence—Sentencing Decision.**

Instruction 13. PIK 4th 68.020, Concluding Instruction—Capital Murder—Sentencing Proceeding.

Verdict Forms. PIK 4th 68.180, Capital Murder—Verdict Form for Sentence of Death

PIK 4th 68.210, Capital Murder—Verdict Form for Sentence as Provided by Law—Alternative Sentence

TEXT OF SUGGESTED INSTRUCTIONS—PENALTY PHASE

Instruction No. 1.

Because the defendant has been found guilty of capital murder, a separate sentencing proceeding will now be conducted to determine whether the defendant shall be sentenced to death. At this hearing, you shall consider the question of sentence, including evidence of aggravating and mitigating circumstances.

It is my duty to instruct you in the law that applies to this sentencing proceeding, and it is your duty to consider and follow all of the instructions. You must decide the question of the sentence by applying these instructions to the facts as you find them.

(PIK 4th 54.030)

Instruction No. 2.

In your determination of sentence, you should consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

(PIK 4th 50.050, Revised)

Instruction No. 3

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 4th 50.060)

Instruction No. 4

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 4th 50.070)

Instruction No. 5

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

(PIK 4th 51.060)

Instruction No. 6

Aggravating circumstances are those that increase the enormity of the crime of capital murder or add to its injurious consequences.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

- 1. The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.**
- 2. The defendant committed the crime of capital murder while serving a sentence of imprisonment on conviction of a felony.**

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

(PIK 4th 54.040)

Instruction No. 7

Mitigating circumstances are those that in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or that justify a sentence of less than death, even though they do not justify or excuse the offense.

The appropriateness of exercising mercy can itself be a mitigating circumstance in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as individual jurors to decide under the facts and circumstances of the case.

The defendant contends that mitigating circumstances include, but are not limited to, the following:

- 1. The age of the defendant at the time of the crime.**
- 2. At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.**

You may further consider as a mitigating circumstance any other aspect of the defendant's character, background, or record, and any other aspect of the offense that was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance found to exist.

(PIK 4th 54.050)

Instruction No. 8

The State must prove beyond a reasonable doubt that one or more aggravating circumstances exist and that the aggravating circumstances are not outweighed by any mitigating circumstances found to exist.

(PIK 4th 54.060)

Instruction No. 9

Mitigating circumstances are not required to be proved beyond a reasonable doubt. They must only be proved to the satisfaction of the individual juror in that juror's sentencing decision.

The same mitigating circumstances are not required to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

(PIK 4th 54.061)

Instruction No. 10

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances found to exist, your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

(PIK 4th 54.070)

Instruction No. 11

If you find unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and they are not outweighed by any mitigating circumstances found to exist, you shall impose a sentence of death. If you sentence the defendant to death, designate on the appropriate verdict form the aggravating circumstances that you unanimously found beyond a reasonable doubt.

If you do not find unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and they are not outweighed by any mitigating circumstances found to exist, indicate on the appropriate verdict form that the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be sentenced to death but will be sentenced by the court to imprisonment for life with no possibility of parole.

(PIK 4th 54.090)

Instruction No. 12

At the conclusion of your deliberations, you shall sign the appropriate verdict form.

You have been provided two verdict forms that provide the following alternative verdicts:

- A. Finding unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and they are not outweighed by any mitigating circumstances found to exist, and sentencing the defendant to death.**

OR

- B. Stating that the jury is unable to reach a unanimous verdict sentencing the defendant to death.**

(PIK 4th 54.100)

Instruction No. 13

Your Presiding Juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in Court and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.

Your agreement upon a verdict sentencing the defendant to death must be unanimous.

District Judge

_____, _____.

(PIK 4th 68.020)

VERDICT FORMS**SENTENCING VERDICT**

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- ☐ **The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.**
- ☐ **The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.**

and so, therefore, unanimously sentence the defendant to death.

Presiding Juror

_____, _____.
(PIK 4th 68.180)

OR

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, state that we are unable to reach a unanimous verdict sentencing the defendant to death.

Presiding Juror

_____, _____.
(PIK 4th 68.210)

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